S. Hrg. 101-511

COMPETITIVE PROBLEMS IN THE CABLE TELEVISION INDUSTRY

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
MONOPOLIES AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

COMPETITIVE PROBLEMS IN THE CABLE TELEVISION INDUSTRY

APRIL 12, ~~1990~~ 1989

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Page
Metzenbaum, Hon. Howard M ... 1, 13
Thurmond, Hon. Strom ... 21
DeConcini, Hon. Dennis ... 23
Kohl, Hon. Herbert ... 25

CHRONOLOGICAL LIST OF WITNESSES

Panel consisting of Thomas J. Volgy, mayor, Tucson, AZ, on behalf of the U.S. Conference of Mayors and the National League of Cities, Tucson, AZ; Saul N. Ramirez, Jr., mayor pro-tem and city councilman, Laredo, TX; and Gene Kimmelman, legislative director, Consumer Federation of America, Wash., DC, accompanied by Mark N. Cooper, director of research, CFA ... 35
Gerald M. Levin, vice chairman, Time, Inc., New York, NY, and James P. Mooney, president and CEO, National Cable Television Association, Wash., DC ... 107
Panel consisting of Edward O. Fritts, president and CEO, National Association of Broadcasters, Wash., DC; Preston R. Padden, president, Association of Independent Television Stations, Inc., Wash., DC; Robert L. Schmidt, president, Wireless Cable Association, Wash., DC; and Janusz A. Ordover, professor of economics, New York University, New York, NY ... 299

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Cooper, Mark N.:
  Prepared statement with exhibits ... 61
Fritts, Edward O.:
  Testimony ... 299
  Prepared statement ... 301
    A special report from Research & Planning entitled "The Economic Impact of Cable on Broadcasting," by Michael O. Wirth, Ph.D., University of Denver ... 313
Kimmelman, Gene:
  Testimony ... 59
  Prepared statement with exhibits ... 61
Levin, Gerald M.:
  Testimony ... 107
  Prepared statement ... 110
  Letter from James A. Chiddix, senior vice president of engineering and technology, ATC, pointing out the differences between the use of Z-TAC on cable system and over the air ... 291
Metzenbaum, Hon. Howard M.:
  Resolution from an organization representing 26 Ohio communities which urges re-regulation of the cable industry ... 3
Mooney, James P.:
  Testimony ... 161
  Prepared statement ... 163
Ordover, Janusz A.:
  Testimony ... 483
  Prepared statement with charts and tables ... 485
Padden, Preston R.:
  Testimony ... 341
  Newspaper articles ... 343
  Prepared statement with several attachments ... 349

Page

Ramirez, Saul N., Jr.:
  Testimony 47
  Prepared statement 49
Schmidt, Robert L.:
  Testimony 450
  Prepared statement with exhibits 452
Simon, Hon. Paul:
  Prepared statement of Glenn Manishin, lawyer, Jenner & Block 28
Volgy, Thomas J.:
  Testimony 35
  Prepared statement 38

APPENDIX

Letters to Charles Rule from Senator Metzenbaum 503
Letters to Senator Metzenbaum from:
  James P. Mooney, National Cable Television Association 510
  Edward O. Fritts, National Association of Broadcasters 514
  Preston R. Padden, Independent Television 519
  Robert L. Schmidt, Wireless Cable Association, Inc 522
Prepared statement of Jack Valenti, Motion Picture Association of America, Inc 530
Letters to Senator Metzenbaum from:
  B. R. Phillips III, National Rural Telecommunications Cooperative 544
  Edward I. Koch, mayor of the City of New York 557
  Caroline M. Chambers, National Association of Regulatory Utility Commissioners 565
  Mike Reardon, Minnesota Association of Cable Television Administrators. 568
  Clarine N. Riddle, acting attorney general, State of Connecticut 572
  Hans Giner, American Home Satellite Association 576
  Jeffrey J. Younger, Home Dish Satellite Networks, Inc 603
  R.L. Vogelsang, National Satellite Programming Network 615
  James Erickson, City of Millbrae, CA 617
  Abbe Land and John Heilman, City of West Hollywood, CA 620
  Kent R. Rose, Vail, CO 623
  Jerry Plott, Tuscaloosa, AL 625
  Michael P. Garvey, San Carlos, CA 628
  Joan Conley, Midwest Cable Consumer Alliance 623
Note regarding availability of additional material that was placed in subcommittee file 637

COMPETITIVE PROBLEMS IN THE CABLE TELEVISION INDUSTRY

WEDNESDAY, APRIL 12, 1989

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS
RIGHTS, COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:33 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howard M. Metzenbaum, chairman of the subcommittee, presiding.

Also present: Senators DeConcini, Simon, Kohl, Thurmond, and Specter.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. The hearing will come to order.

Today, we are holding hearings on competitive problems in the cable television industry. I must tell you I wish we did not have to have these hearings. A year ago, I chaired hearings on this same topic. We heard about how cable rates nationwide had jumped since deregulation—20 percent in the first year of deregulation, according to conservative estimates. In my home State of Ohio, the GAO found that rates have leaped 27 percent since deregulation. Some communities around the country faced rate increases of over 100 percent after deregulation.

At last year's hearing, we heard that consumers who wanted cable—or had to take it in order to receive adequate TV reception—had only one choice of cable systems. We heard about how vertical integration discouraged the large multisystem cable operators from dealing with competing technologies on fair terms. We heard about how local broadcast stations were being dropped by cable systems and replaced with programs owned or controlled by the cable industry. My staff conducted a survey which confirmed the testimony received from noncable technology representatives to the effect that they were being denied programming which they need in order to compete.

After hearing all this testimony, I indicated that the cable industry should clean up its act, or else we here in Congress would have to take a hard look at re-regulating the industry.

It is an interesting fact of life around the Congress that so often those who know there is a problem are so reluctant to move on the problem themselves, and it requires Congress to move. Sometimes when we do move, I am not sure we always come to the right conclusions, because we are not as knowledgeable as those who are in the industry themselves.

But a year has passed, and, if anything, the situation has worsened. Nationally, basic cable rates have now risen 32 percent since deregulation. The Government reports that the price consumers pay for cable service increased at a greater rate than any other commodity or service in the entire United States. Consumers still have only one choice when it comes to obtaining cable television, and they are complaining loudly about both rates and service. I have with me a resolution from an organization representing 26 Ohio communities which urges re-regulation of the cable industry. Scores of local officials from communities around the country also have written to me asking that something be done to restore the cities 'regulatory authority to restrain the rates charged by cable systems.

[Aforementioned material follows:]

INTERCOMMUNITY CABLE
REGULATORY COMMISSION
11707 Lebanon Pike • Cincinnati, Ohio 45241
(513) 563-7667

89 JAN -9 PM 3:19

Serving the Communities of

Arlington Hgts.
Columbia Twp.
Deerfield Twp.
Elmwood Place
Evendale
Glendale
Harrison
Harrison Twp.
Indian Hill
Lincoln Hgts.
Lockland
Loveland
Milford
Mt. Healthy
N. College Hill
Reading
Sharonville
Silverton
Springdale
St. Bernard
Sycamore Twp.
Terrace Park
Union Twp.
Woodlawn

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President

Harry Matthews
Vice President

Lucius Ware
Treasurer

Patricia J. Havlik
Administrator

Rod R. Swartz
Access Coordinator

Dottie Darland
Secretary

January 4, 1989

Senator Howard Metzenbaum
140 Russell Senate Office Building
Washington, D.C. 20515

Enclosed you will find Resolutions passed by our member communities regarding Warner Cable Communications basic cable rate increases. Our Commission represents 26 communities in areas of cable regulation and public access production. We felt you should be aware of what has happened to our cable rates since the Cable Communications Policy Act of 1984.

Our present rates for cable service are as follows:

		Ch	
Limited Basic	$ 8.20 -	(24)	A/B Switch (no converter)
Expanded	19.20 -	(42)	
Qube	19.20 -	(60)	No remote control
	22.20 -	(60)	Quest remote control

Limited Basic Additional Outlets	$8.20
Expanded Additional Outlets	8.95
All Other Additional Outlets	8.95

The monthly rate for Expanded additional outlets will continue to be discounted $2.00 to $6.95 for customers with two or more premium channels. They have been able to maintain the monthly rates on all of their premium services so there is no change in the following services: Home Box Office, Cinemax, The Movie Channel, Showtime, The Disney Channel and Bravo. In our communities the 2% franchise fee will continue to be an addition to the above rates.

If you have any questions, please contact our office. Thank you for your time.

Sincerely,

Pat Havlik

Pat Havlik, Administrator
Intercommunity Cable Regulatory Commission

Encl.

RESOLUTION 1988-69

A RESOLUTION URGING CONGRESS OF THE UNITED STATES TO REVIEW AND AMEND THE PROVISIONS OF S.B. 66, THE CABLE COMMUNICATIONS POLICY ACT OF 1984, WHICH DEREGULATED THE RATE REVIEW AND RATE SETTING AUTHORITY OF CABLE FRANCHISORS.

WHEREAS, The Cable Communications Policy Act of 1984 has, for most franchise areas, removed all rate setting authority over cable operators from all Federal, State and local agencies as of December 30, 1986: and

WHEREAS, said deregulatory efforts have been in greatest evidence since the Federal Communications Commission issued its memorandum opinion and order November 15, 1983, restricting rate setting powers already granted to franchisors by statutes, ordinance and contracts, and since the enactment of The Cable Communications Policy Act of 1984, particularly Section 623 thereof: and

WHEREAS, the gradual removal of any kind of rate setting authority or review has resulted in enormous increases in the costs to customers, depending upon their cable supplier and location: and

WHEREAS, cable subscribers in the Sycamore Township, Ohio franchise area have recently been informed of a nearly 30 percent increase in the cost of economy service and a nearly 30 percent increase in the cost of additional outlets on the economy level, plus many other similarly substantial increases in various levels of service: and

WHEREAS, existing law provides no checks whatsoever on the ability of most cable franchisees to exact exhorbitant prices and reap unreasonable profits from the citizens whose rights-of-way have been placed at the companies disposal: and

WHEREAS, the inability to impose reasonable restraints on the rate setting powers of cable operators has reduced the ability of franchisors to enforce provisions of franchise agreements freely entered into by cable companies: and

WHEREAS, Warner Cable Communications, Inc. expressly promised during the franchise award process to submit its basic rates to regulation despite any subsequent change in Federal regulation: now, therefore,

Be it resolved by the Board of Trustees of Sycamore Township, State of Ohio:

Section I: That the Congress of the United States review and amend the provisions of S.B. 66, The Cable Communications Policy Act of 1984, in light of the onerous and unfettered imposition of rate increases by cable operators in the aftermath of substantial deregulation of contractually agreed to rate setting provisions of the franchise agreement between Sycamore Township and Warner Cable Communications, Inc.

Section II: That the Congress take such action as is necessary to assure a reasonable, nonconfiscatory rate setting scheme long before the 1990 due date for the Federal Communication Commission report to Congress on the effects of rate deregulation on cable services, as set forth in Section 623 of the Cable Act, as the damage by then may be far too extensive to rectify.

Section III: That this resolution be spread upon the minutes of Council and that copies hereof be sent to the ICRC whereby they will be forwarded to the attached:

Dated: December 23, 1988

Thomas G. Eberhard
Thomas G. Eberhard, President

Clete L. McDaniel, Vice-President

Robert L. Schuler, Trustee

ATTEST:

Frank J. D'Andrea

RESOLUTION 11 -88

A RESOLUTION URGING CONGRESS OF THE UNITED STATES TO REVIEW AND AMEND THE PROVISIONS OF S.B. 66, THE CABLE COMMUNICATIONS POLICY ACT OF 1984, WHICH DEREGULATED THE RATE REVIEW AND RATE SETTING AUTHORITY OF CABLE FRANCHISORS.

WHEREAS, The Cable Communications Policy Act of 1984 has, for most franchise areas, removed all rate setting authority over cable operators from all Federal, State and local agencies as of December 30, 1986: and

WHEREAS, said deregulatory efforts have been in greatest evidence since the Federal Communications Commission issued its memorandum opinion and order November 15, 1983 restricting rate setting powers already granted to franchisors by statutes, ordinance and contracts, and since the enactment of The Cable Communications Policy Act of 1984, particularly Section 623 thereof: and

WHEREAS, the gradual removal of any kind of rate setting authority or review has resulted in enormous increases in the costs to customers, depending upon their cable supplier and location: and

WHEREAS, cable subscribers in the Harrison, Ohio franchise area have recently been informed of a nearly 30 percent increase in the cost of economy service and a nearly 30 percent increase in the cost of additional outlets on the economy level, plus many other similarly substantial increases in various levels of service: and

WHEREAS, existing law provides no checks whatsoever on the ability of most cable franchisees to exact exhorbitant prices and reap unreasonable profits from the citizens whose rights-of-way have been placed at the companies disposal: and

WHEREAS, the inability to impose reasonable restraints on the rate setting powers of cable operators has reduced the ability of franchisors to enforce provisions of franchise agreements freely entered into by cable companies: and

WHEREAS, Warner Cable Communications, Inc. expressly promised during the franchise award process to submit its basic rates to regulation despite any subsequent change in Federal regulation: now, therefore,

Be it resolved by the Council of the City of Harrison, State of Ohio:

Section I: That the Congress of the United Stated review and amend the provisions of S.B. 66, The Cable Communications Police Act of 1984, in light of the onerous and unfettered imposition of rate increases by cable operators in the aftermath of substantial deregulation of contractually agreed to rate setting provisions of the franchise agreement between the City of Harrison and Warner Cable Communications, Inc.

Section II: That the Congress take such action as is necessary to assure a reasonable, nonconfiscatory rate setting scheme long before the 1990 due date for the Federal Communication Commission report to Congress on the effects of rate deregulation on cable services, as set forth in Section 623 of the Cable Act, as the damage by then may be far too extensive to rectify.

Section III: That this resolution be spread upon the minutes of Council and that copies hereof be sent to the ICRC whereby they will be forwarded to the attached:

Dated: 12-6, 1988

Harry A Rolfes
Harry A. Rolfes, Mayor

ATTEST:

Cathy Benson
Cathy Benson, Clerk

City of Cincinnati
COUNCIL

SANDY SHERMAN, *Clerk of Council*
MARILYN KAISER, *Chief Deputy Clerk*
CHARLES B. NUCKOLLS, *Deputy Clerk*

JEANETTE STEWART, *Deputy Clerk*
LINDA MORRIS-BRAY, *Deputy Clerk*
JOHNNIE LILLARD, *Deputy Clerk*

April 4, 1989

The Honorable Howard M. Metzenbaum
United States Senate
140 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Metzenbaum:

Council of the City of Cincinnati, State of Ohio, at its session on March 29 1989, approved a resolution entitled:

RESOLUTION NO. R/26-1989

Expressing the sense of Council that the Congress of the United States reopen the subject of state and local regulation of various aspects of the provision of Cable Antenna Television services which are currently pre-empted by the provisions of the Cable Communications Policy Act of 1984.

At the request of Council a copy of this resolution is enclosed.

Very truly yours,

Sandy L. Sherman

SANDY L. SHERMAN,
Clerk of Council

SLS/llmb

encl.

Room 308, City Hall, Cincinnati, Ohio 45202 Phone 513-352-3246

Equal Opportunity Employer

N.H.S.

RESOLUTION NO. R/26 -1989

Expressing the sense of Council that the Congress of the United States reopen the subject of state and local regulation of various aspects of the provision of Community Antenna Television services which are currently pre-empted by the provisions of the Cable Communications Policy Act of 1984.

WHEREAS, the Cable Communications Policy Act of 1984 substantially removed the rights of states and municipalities to regulate the rates charged by cable companies, and the channels carried within a franchised area; and

WHEREAS, the service provided by the cable company is in the opinion of Council a public convenience and necessity like any other public utility; and

WHEREAS, since deregulation with the merging of cable companies and the vertical and horizontal integration between cable companies and program suppliers a virtual monopoly has been created whereby competing technologies are rendered incapable of providing effective competition; and

WHEREAS, the gradual removal of any substantial kind of rate setting authority or review has resulted in increases in rates to consumers; and

WHEREAS, citizens and municipalities have historically held certain rights in the regulation and oversight of the rates and services of public utility monopolies; now, therefore,

BE IT RESOLVED by the Council of the city of Cincinnati, state of Ohio:

Section 1. That it is the sense of Council that the Congress of the United States reopen the subject of state and local regulation of various aspects of the provision of Community Antenna Television services which are currently pre-empted by the provisions of the Cable Communications Policy Act of 1984.

Section 2. That it is the sense of Council that additional federal legislation is necessary in order to enable alternative technologies to effectively compete with cable television operations and that Council supports enactment of the Cable Subscriber's Bill of Rights, a copy of which is attached hereto.

Section 3. That this resolution be spread upon the minutes of Council and that copies hereof be sent to the National League of Cities, National Association of Telecommunication, United

States Conference of Mayors, Congressman Willis D. Gradison, Jr., Congressman Thomas A. Luken, Senator Howard Metzenbaum, Senator John Glenn, Congressman Timothy E. Wirth, Congressman John D. Dingell, and New York State Cable Awareness Association.

Passed March 29 A.D., 1989

Mayor

Attest Sam L. Sherman
Clerk

N. Y. S. C. A. A.
New York State Cable Awareness Assoc.
P.O. Box 453, High Falls, NY 12440
914 687 0763

CABLE SUBSCRIBERS' BILL OF RIGHTS

This petition is a CALL OF ACTION to the 101st. congress to re-visit the Cable Deregulation Act of 1984 and amend it so as to bring effective competition in and out of cable areas.

We believe that cable systems are operating without effective competition and therefore afforded monopoly status by the Deregulation Act of 1984.

We believe that alternative technologies should be given enhanced status to effectively compete in cable areas.

We believe that where a single cable system exists, without 25% penetration by alternative technologies (dishes, wireless, pc, smatv, telco, etc.) cities should be allowed oversight of the rates, channels, and service in a "public utility status".

We believe that where a cable system has public utility status the operator should not have a financial interest either direct or indirect in more than 5 of the channels selected for the system.

We believe that the subscribers 1st. Amendment rights are of greater concern than the cable companies therefore all editorials are issues of controversy initiated over the cable by the cable owner or the cable industry and are answerable on an equal access basis.

We believe that all local broadcast, and C-span 1 and 2 should receive first priority placement on cable channels.

We believe that multiple hook-ups to cable by a subscriber in their home should not cause an additional fee (like telephone jacks).

We believe that cable programming should be made available on a nondiscriminatory basis to alternative technologies through third party distributors for competitive delivery.

We believe that undisclosed gifts of cable programming and services to appointed or elected officials constitutes a bribe and should be illegal.

We believe that cable systems operating in a "public utility" status must spend a designated percentage of profits to expand their services into unserved areas rather than to buy other systems or invest in ownership of channels.

We support the Association of States Attorney Generals investigation into antitrust activities by cable and believe this should be investigated by the U.S. Attorney General and the Federal Trade Commission.

Senator **Metzenbaum**. Such authority is critical, because the lack of competition in cable means that there is no mechanism capable of putting downward pressure on cable rates. Without competition, there is no downward pressure.

What does that mean in terms of dollars and cents? This morning, the Consumer Federation of America, using a measurement of monopoly power pioneered by James Tobin, a Nobel Prize-winning economist, will testify that each year consumers are being overcharged billions of dollars—and I did not say millions, I said billions of dollars—by the cable monopolies.

Meanwhile, the Time-Warner merger portends accelerated concentration in the media and entertainment industries as a whole. The ever-shrinking number of players in those industries not only could undermine competition, but also threatens to reduce the diversity of information and entertainment sources.

The Time-Warner merger means that the top two firms in the cable industry—TCI and Time, Inc.—will now control over 35 percent—over 35 percent—of the national market, a level of concentration which some experts have suggested could be very costly for consumers. More importantly, the merger demonstrates that the increased concentration in the cable industry is not benefiting consumers. The big cable MSO's are simply consolidating their monopoly power at the local level, rather than providing consumers with a real choice among competing cable companies.

The problems associated with vertical integration have continued unabated. An FCC survey reports that since the must-carry rules were invalidated by the DC Circuit, over 700 local stations have been denied carriage by cable systems. The vast majority of these stations would have been carried had must-carry rules been in effect. In most cases, the stations were replaced with programming in which the operator has a financial stake or programming in which the operator is entitled to sell advertising.

We are developing an economic Goliath. We are denying the people of this country the right to hear free television, to hear television programming, except as determined by the owners of the cable systems.

Meanwhile, HBO and Showtime still refuse to make their programming available on fair terms to technologies that compete with cable. For example, a wireless cable operation in Cleveland—Metroten—has had enormous difficulty obtaining HBO. I am pleased to note, however, that an agreement in principle has been reached between the two parties. Metroten has been trying to get HBO for 5 years, so I will withhold my applause over this agreement until the ink is dry on the contract.

In any event, Metroten is also having trouble getting Sports Channel Ohio, which shows Cleveland Cavalier games and the National Hockey League playoffs. Sports Channel Ohio is owned by Cablevision, a cable MSO which operates the cable system in Cleveland.

Metroten's ability to get premium programming is important because in a November referendum, the people of Cleveland overwhelmingly voted for cable competition. I know that there are hundreds of other communities, maybe thousands, around the country that would like to see more competition as well.

This Antitrust Subcommittee has as a basic premise the realization and acknowledgment that only with competition do you get the free enterprise system working well; and that when you do not have competition, the system just does not operate that well.

The cable industry should not be permitted to thwart their will by denying competing technologies the programming that is needed to compete.

With rates continuing to rise and competition still being stifled through most of the country, it is clear that something has to be done about the cable industry. They have refused to act on their own. The Congress has a responsibility. The Cable Act provides that cities can regulate rates only in the absence of effective competition. What a joke that was. And we in the Congress created the joke upon ourselves and the people of this country. Our mistake was to let the FCC define effective competition. The Commission's definition does not comport with reality. The Commission's definition was irresponsible. They failed to meet their public responsibilities. Their definition provides that a cable system faces effective competition if three over-the-air television signals are present in a particular cable community. As a result, almost every city across the country is prevented from regulating rates.

As I sit here, I do not know of any city, any community in Ohio—and, frankly, I do not know of any in the country—that is not served by an ABC outlet, an NBC outlet, and a CBS outlet. And if there were one, I am certain that the station or the network that was not being served would see to it that coverage was provided promptly. So that the FCC decision, in effect, totally nullified the congressional intent with respect to the matter of effective competition being in the area. We erred; they compounded our error.

I am sure most people regard the broad array of programming available on cable television as a separate and distinct product from over-the-air television. The proof is in consumer behavior. The FCC says that three free TV channels are a competitive substitute for cable. If that is the case, then why are millions of consumers paying more and more money for cable when the FCC says they can get a comparable substitute for free? Either consumers are behaving irrationally, or the FCC's decision is irrational. I will vote for the latter. Personally, I have no trouble giving consumers the benefit of the doubt on that score.

It is axiomatic that if competition is not able to restrain prices in a given product market, regulation may be the only alternative. I have not abandoned all hope that the market for cable television can be competitive. But I am convinced that the FCC's mistake must be corrected now. That is why I am introducing a bill that will redefine effective competition in a manner that will enable cities to regulate cable rates unless consumers have a real choice when it comes to obtaining multichannel video programming.

I am also introducing a separate bill that will require vertically integrated cable companies to make their programming available for purchase by competing technologies on fair terms. If a cable programmer sets certain financial criteria and signal security standards for the distributors of its programming, and a wireless operator meets those standards, then it should be able to purchase that programming for its viewers.

Thirteen years ago, Congress passed a law ensuring that the fledgling cable industry would have access to broadcast programming; now, it is time for Congress to pass a law ensuring that the fledgling technologies which compete with cable get access to cable programming.

In addition, this bill will limit horizontal concentration in the cable industry by prohibiting any one cable company from controlling more than 25 percent of the cable subscribers in the country. Similar limits are in place with respect to control of broadcast stations. These limits will ensure that control over the conduit of information and entertainment into the home does not fall into the hands of just a few vertically integrated MSO's which have the incentive to favor their own program holdings. They will also protect small cable operators from the expansive appetites of the big MSO's. And these limits should also help stimulate competition at the local level.

Competition in the cable industry is a crucial pocketbook issue for consumers. It is also important to anyone who cares about preserving a diversity of entertainment and information sources. I look forward to hearing from today's witnesses.

[The prepared statement of Senator Metzenbaum follows:]

U.S. Senator Howard M.
METZENBAUM
of Ohio

Committees:
Judiciary
Labor and Human Resources
Energy and Natural Resources
Select Committee on Intelligence

Chairmanships:
Subcommittee on Antitrust
Subcommittee on Labor
Subcommittee on Energy
Regulation and Conservation

OPENING STATEMENT
SENATOR HOWARD M. METZENBAUM
HEARING ON COMPETITIVE PROBLEMS IN THE CABLE TELEVISION INDUSTRY
APRIL 12, 1989   9:30 AM   SD-226

TODAY WE ARE HOLDING HEARINGS ON COMPETITIVE PROBLEMS IN THE CABLE TELEVISION INDUSTRY. I MUST TELL YOU I WISH WE DIDN'T HAVE TO HAVE THESE HEARINGS. A YEAR AGO, I CHAIRED HEARINGS ON THIS SAME TOPIC. WE HEARD ABOUT HOW CABLE RATES NATIONWIDE HAD JUMPED SINCE DEREGULATION -- 20% IN THE FIRST YEAR OF DEREGULATION ACCORDING TO CONSERVATIVE ESTIMATES. IN MY HOME STATE OF OHIO, THE GAO FOUND THAT RATES HAVE LEAPED 27% SINCE DEREGULATION. SOME COMMUNITIES AROUND THE COUNTRY FACED RATE INCREASES OF OVER 100% AFTER DEREGULATION.

AT LAST YEAR'S HEARING, WE HEARD THAT CONSUMERS WHO WANTED CABLE -- OR HAD TO TAKE IT IN ORDER TO RECEIVE ADEQUATE TV

RECEPTION -- HAD ONLY ONE CHOICE OF CABLE SYSTEMS. WE HEARD ABOUT HOW VERTICAL INTEGRATION DISCOURAGED THE LARGE MULTI-SYSTEM CABLE OPERATORS FROM DEALING WITH COMPETING TECHNOLOGIES ON FAIR TERMS. WE HEARD ABOUT HOW LOCAL BROADCAST STATIONS WERE BEING DROPPED BY CABLE SYSTEMS AND REPLACED WITH PROGRAMS OWNED OR CONTROLLED BY THE CABLE INDUSTRY. MY STAFF CONDUCTED A SURVEY WHICH CONFIRMED THE TESTIMONY RECEIVED FROM NON-CABLE TECHNOLOGY REPRESENTATIVES TO THE EFFECT THAT THEY WERE BEING DENIED PROGRAMMING WHICH THEY NEED TO COMPETE.

AFTER HEARING ALL THIS TESTIMONY, I INDICATED THAT THE CABLE INDUSTRY HAD BETTER CLEAN UP ITS ACT OR ELSE WE HERE IN CONGRESS WOULD HAVE TO TAKE A HARD LOOK AT RE-REGULATING THE INDUSTRY.

A YEAR HAS PASSED, AND IF ANYTHING THE SITUATION HAS WORSENED. NATIONALLY, BASIC CABLE RATES HAVE NOW RISEN 32% SINCE DEREGULATION. THE GOVERNMENT REPORTS THAT THE PRICE CONSUMERS PAY FOR CABLE SERVICE INCREASED AT A HIGHER RATE THAN ANY OTHER COMMODITY OR SERVICE IN THE ENTIRE UNITED STATES. CONSUMERS STILL ONLY HAVE ONE CHOICE WHEN IT COMES TO OBTAINING CABLE TELEVISION, AND THEY ARE COMPLAINING LOUDLY ABOUT BOTH RATES AND SERVICE. I HAVE WITH ME A RESOLUTION FROM AN ORGANIZATION REPRESENTING 26 OHIO COMMUNITIES WHICH URGES RE-REGULATION OF THE CABLE INDUSTRY. SCORES OF LOCAL OFFICIALS FROM COMMUNITIES AROUND THE COUNTRY ALSO HAVE WRITTEN TO ME ASKING THAT SOMETHING BE DONE TO RESTORE THE CITIES' REGULATORY AUTHORITY TO RESTRAIN THE RATES CHARGED BY CABLE SYSTEMS.

SUCH AUTHORITY IS CRITICAL, BECAUSE THE LACK OF COMPETITION IN CABLE MEANS THAT THERE IS NO MECHANISM CAPABLE OF PUTTING DOWNWARD PRESSURE ON CABLE RATES. WHAT DOES THAT MEAN IN TERMS OF DOLLARS AND CENTS? THIS MORNING, THE CONSUMER FEDERATION OF AMERICA -- USING A MEASUREMENT OF MONOPOLY POWER PIONEERED BY JAMES TOBIN, A NOBEL-PRIZE WINNING ECONOMIST -- WILL TESTIFY THAT EACH YEAR CONSUMERS ARE BEING OVERCHARGED BILLIONS OF DOLLARS BY THE CABLE MONOPOLIES.

MEANWHILE, THE TIME-WARNER MERGER PORTENDS ACCELERATED CONCENTRATION IN THE MEDIA AND ENTERTAINMENT INDUSTRIES AS A WHOLE. THE EVER-SHRINKING NUMBER OF PLAYERS IN THOSE INDUSTRIES NOT ONLY COULD UNDERMINE COMPETITION, BUT ALSO THREATENS TO REDUCE THE DIVERSITY OF INFORMATION AND ENTERTAINMENT SOURCES.

THE TIME-WARNER MERGER MEANS THAT THE TOP TWO FIRMS IN THE CABLE INDUSTRY -- TCI AND TIME, INC. -- WILL NOW CONTROL OVER 35% OF THE NATIONAL MARKET, A LEVEL OF CONCENTRATION WHICH SOME EXPERTS HAVE SUGGESTED COULD BE VERY COSTLY FOR CONSUMERS. MORE IMPORTANTLY, THE MERGER DEMONSTRATES THAT THE INCREASED CONCENTRATION IN THE CABLE INDUSTRY IS NOT BENEFITING CONSUMERS. THE BIG CABLE MSOs ARE SIMPLY CONSOLIDATING THEIR MONOPOLY POWER AT THE LOCAL LEVEL, RATHER THAN PROVIDING CONSUMERS WITH A REAL CHOICE AMONG COMPETING CABLE COMPANIES.

THE PROBLEMS ASSOCIATED WITH VERTICAL INTEGRATION HAVE CONTINUED UNABATED. AN FCC SURVEY REPORTS THAT SINCE THE MUST-CARRY RULES WERE INVALIDATED BY THE D.C. CIRCUIT, OVER 700

LOCAL STATIONS HAVE BEEN DENIED CARRIAGE BY CABLE SYSTEMS. THE VAST MAJORITY OF THESE STATIONS WOULD HAVE BEEN CARRIED HAD MUST-CARRY RULES BEEN IN EFFECT. IN MOST CASES, THE STATIONS WERE REPLACED WITH PROGRAMMING IN WHICH THE OPERATOR HAS A FINANCIAL STAKE OR PROGRAMMING IN WHICH HE IS ENTITLED TO SELL ADVERTISING.

MEANWHILE, HBO AND SHOWTIME STILL REFUSE TO MAKE THEIR PROGRAMMING AVAILABLE ON FAIR TERMS TO TECHNOLOGIES THAT COMPETE WITH CABLE. FOR EXAMPLE, A WIRELESS CABLE OPERATION IN CLEVELAND -- METROTEN -- HAS HAD ENORMOUS DIFFICULTY OBTAINING HBO. I AM PLEASED TO NOTE, HOWEVER, THAT AN AGREEMENT IN PRINCIPLE HAS BEEN REACHED BETWEEN THE TWO PARTIES. METROTEN HAS BEEN TRYING TO GET HBO FOR FIVE YEARS, SO I'LL WITHHOLD MY APPLAUSE OVER THIS AGREEMENT UNTIL THE INK IS DRY ON THE CONTRACT.

IN ANY EVENT, METROTEN IS ALSO HAVING TROUBLE GETTING SPORTS CHANNEL OHIO, WHICH SHOWS CLEVELAND CAVALIER GAMES AND THE NATIONAL HOCKEY LEAGUE PLAYOFFS. SPORTS CHANNEL OHIO IS OWNED BY CABLEVISION, A CABLE MSO WHICH OPERATES THE CABLE SYSTEM IN CLEVELAND.

METROTEN'S ABILITY TO GET PREMIUM PROGRAMMING IS IMPORTANT BECAUSE IN A NOVEMBER REFERENDUM, THE PEOPLE OF CLEVELAND OVERWHELMINGLY VOTED FOR CABLE COMPETITION. I KNOW THAT THERE ARE HUNDREDS OF OTHER COMMUNITIES AROUND THE COUNTRY THAT WOULD LIKE TO SEE MORE COMPETITION AS WELL. THE CABLE INDUSTRY SHOULD NOT BE PERMITTED TO THWART THEIR WILL BY DENYING

COMPETING TECHNOLOGIES THE PROGRAMMING THAT'S NEEDED TO COMPETE.

WITH RATES CONTINUING TO RISE AND COMPETITION STILL BEING STIFLED THROUGHOUT MOST OF THE COUNTRY, IT'S CLEAR THAT SOMETHING HAS GOT TO BE DONE ABOUT THE CABLE INDUSTRY. THE CABLE ACT PROVIDES THAT CITIES CAN REGULATE RATES ONLY IN THE ABSENCE OF EFFECTIVE COMPETITION. OUR MISTAKE WAS TO LET THE FCC DEFINE EFFECTIVE COMPETITION. THE COMMISSION'S DEFINITION DOES NOT COMPORT WITH REALITY. IT PROVIDES THAT A CABLE SYSTEM FACES EFFECTIVE COMPETITION IF THREE OVER-THE-AIR TELEVISION SIGNALS ARE PRESENT IN A PARTICULAR CABLE COMMUNITY. AS A RESULT, ALMOST EVERY CITY ACROSS THE COUNTRY IS PREVENTED FROM REGULATING RATES.

I AM SURE MOST PEOPLE REGARD THE BROAD ARRAY OF PROGRAMMING AVAILABLE ON CABLE TELEVISION AS A SEPARATE AND DISTINCT PRODUCT FROM OVER-THE-AIR TELEVISION. THE PROOF IS IN CONSUMER BEHAVIOR. THE FCC SAYS THAT THREE FREE TV CHANNELS ARE A COMPETITIVE SUBSTITUTE FOR CABLE. IF THAT'S THE CASE, THEN WHY ARE MILLIONS OF CONSUMERS PAYING MORE AND MORE MONEY FOR CABLE WHEN THE FCC SAYS THEY CAN GET A COMPARABLE SUBSTITUTE FOR FREE? EITHER CONSUMERS ARE BEHAVING IRRATIONALLY, OR THE FCC'S DEFINITION IS IRRATIONAL. PERSONALLY, I HAVE NO TROUBLE GIVING CONSUMERS THE BENEFIT OF THE DOUBT ON THAT SCORE.

IT IS AXIOMATIC THAT IF COMPETITION IS NOT ABLE TO RESTRAIN PRICES IN A GIVEN PRODUCT MARKET, REGULATION MAY BE

THE ONLY ALTERNATIVE. I HAVE NOT ABANDONED ALL HOPE THAT THE MARKET FOR CABLE TELEVISION CAN BE COMPETITIVE. BUT I AM CONVINCED THAT THE FCC'S MISTAKE MUST BE CORRECTED NOW. THAT'S WHY I'M INTRODUCING A BILL THAT WILL REDEFINE EFFECTIVE COMPETITION IN A MANNER THAT WILL ENABLE CITIES TO REGULATE CABLE RATES UNLESS CONSUMERS HAVE A REAL CHOICE WHEN IT COMES TO OBTAINING MULTI-CHANNEL VIDEO PROGRAMMING.

I AM ALSO INTRODUCING A SEPARATE BILL THAT WILL REQUIRE VERTICALLY INTEGRATED CABLE COMPANIES TO MAKE THEIR PROGRAMMING AVAILABLE FOR PURCHASE BY COMPETING TECHNOLOGIES ON FAIR TERMS. IF A CABLE PROGRAMMER SETS CERTAIN FINANCIAL CRITERIA AND SIGNAL SECURITY STANDARDS FOR DISTRIBUTORS OF ITS PROGRAMMING, AND A WIRELESS OPERATOR MEETS THOSE STANDARDS, THEN IT SHOULD BE ABLE TO PURCHASE THAT PROGRAMMING FOR ITS VIEWERS.

THIRTEEN YEARS AGO, CONGRESS PASSED A LAW ENSURING THAT THE FLEDGLING CABLE INDUSTRY WOULD HAVE ACCESS TO BROADCAST PROGRAMMING; NOW IT'S TIME FOR CONGRESS TO PASS A LAW ENSURING THAT THE FLEDGLING TECHNOLOGIES WHICH COMPETE WITH CABLE GET ACCESS TO CABLE PROGRAMMING.

IN ADDITION THIS BILL WILL LIMIT HORIZONTAL CONCENTRATION IN THE CABLE INDUSTRY BY PROHIBITING ANY ONE CABLE COMPANY FROM CONTROLLING MORE THAN 25% OF THE CABLE SUBSCRIBERS IN THE COUNTRY. SIMILAR LIMITS ARE IN PLACE WITH RESPECT TO CONTROL OF BROADCAST STATIONS. THESE LIMITS WILL ENSURE THAT CONTROL OVER THE CONDUIT OF INFORMATION AND ENTERTAINMENT INTO THE HOME

DOES NOT FALL INTO THE HANDS OF JUST A FEW VERTICALLY INTEGRATED MSOs WHICH HAVE THE INCENTIVE TO FAVOR THEIR OWN PROGRAM HOLDINGS. THEY WILL ALSO PROTECT SMALL CABLE OPERATORS FROM THE EXPANSIVE APPETITES OF THE BIG MSOs. AND THESE LIMITS SHOULD ALSO HELP STIMULATE COMPETITION AT THE LOCAL LEVEL.

COMPETITION IN THE CABLE INDUSTRY IS A CRUCIAL POCKETBOOK ISSUE FOR CONSUMERS. IT IS ALSO IMPORTANT TO ANYONE WHO CARES ABOUT PRESERVING A DIVERSITY OF ENTERTAINMENT AND INFORMATION SOURCES. I LOOK FORWARD TO HEARING FROM TODAY'S WITNESSES.

Senator **Metzenbaum**. At this point, we will insert in the record the prepared statement of Senator Thurmond.

[The prepared statement of Senator Thurmond follows:]

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS, SENATE JUDICIARY COMMITTEE, REFERENCE COMPETITIVE PROBLEMS IN CABLE T.V., 226 DIRKSEN SENATE OFFICE BUILDING. WEDNESDAY, APRIL 12, 1989, 9:30 A.M.

MR. CHAIRMAN:

It was little more than a year ago that this subcommittee heard testimony from various members of the cable industry, some of them here today, about perceived problems within the industry. Since that time, at least two reports on the cable industry have been published: a report by the Department of Commerce concerning video program distribution and cable television; and a fact sheet report prepared by the GAO for you, Mr. Chairman, concerning rate increases for cable television in Ohio.

There is no question that there are problems within the cable industry. Both the Commerce Department report and the GAO fact sheet provide evidence of that. However, it seems only natural that in a continually developing industry such as cable, we should expect some problems. For example, there have been complaints that the rates for cable service in many communities have risen rapidly since deregulation in 1984. The increase in these rates, however, may not be the result of anticompetitive activities, but rather, the result of adjustments of rates kept artificially low prior to deregulation. Additionally, there is concern about increased concentration of system operators and the vertical integration of these operators into programming. While this situation has the potential to limit the amount of programming available to cable competitors, the involvement by cable operators in the development of programming may bring about more and better program diversity. My concern is whether any of these problems raise antitrust issues which can and should be fixed by legislation, or whether they will be solved without our involvement as the industry continues to mature. While the Chairman believes that some legislation is necessary, in many instances the cable industry may be better off without our interference.

I noted the last time we held hearings that 43 million homes, or 50 percent of those homes which can subscribe to cable, do so. That number has undoubtedly increased within the last year. Moreover, the number of programs available to cable subscribers has also increased. As only one example, the coverage of sporting events, many of them never previously televised, has increased dramatically. I am told that there is even talk of a national high school basketball championship which would be promoted and covered by cable. Movie channels, children's programs and specialized news networks all continue to grow. In my view, these are signs of a healthy and competitive environment.

Mr. Chairman, I want to thank our witnesses for their time in appearing before the subcommittee today, and I look forward to hearing their views on these issues and on the competitive state of the cable industry in general.

Senator **Metzenbaum**. Senator DeConcini is with us. I am very pleased to have you. If you have an opening statement, Senator, we would be happy to hear you.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator **DeConcini**. I do, Mr. Chairman. I want to thank you for scheduling these hearings. Your aggressiveness in the area of antitrust is renowned, and though I do not always agree with you on these points, I want to compliment you, Senator Metzenbaum for stepping forward in a vital time and an important time and pursuing a public hearing on this matter. I do not know that we have any pending legislation today, but I think that even makes it more timely that we look at the whole problem. My compliments.

As chairman of the Subcommittee on Patents, Copyrights, and Trademarks, I have an active interest in the cable and other programming delivery industries, as does Senator Metzenbaum. And I agree that the area of antitrust is one which is of great significance and one that needs to be investigated and pursued.

I believe that Congress must monitor activities in these industries very closely because of their importance to the day-to-day lives of the American people, and because the industries themselves are changing so rapidly.

I am sure all of my colleagues receive, as I do, a lot of complaints from my constituents about the cable industry. As a good illustration of that, our lead-off witness today, a good friend of mine, the Hon. Tom Volgy, mayor of Tucson, will tell us some of the problems that we have experienced in Tucson, my home town, with our local cable system. I hope that the subcommittee listens carefully to Mayor Volgy, for he is, indeed, what I consider an expert in this area as well as in many other areas. He has labored in this area for a long time and has confronted numerous problems that the citizens of Tucson, AZ, have had to endure.

Mr. Chairman, I am concerned about two problems that I see currently in the cable industry, problems that I fear may grow even worse. The first problem is the concentration of ownership of cable television, a problem I think you are delving into today; and the second is the dwindling number of large companies and the integration of ownership of programming services and cable systems in a relatively small number of major cable system owners. This second problem is something that needs to be pursued.

I think that the marketplace could manage either of these problems by itself; but the problems of the existence of a concentration of ownership and of an integration of ownership of services together may lead to a greater problem, one that will force Congress to seek a solution and to find a legislative remedy.

As chairman of the Senate subcommittee that has jurisdiction over compulsory licensing and that allows many cable systems to obtain much of their programming, I want to look at whether the present system is contributing to the problem that we will be addressing here today. As cable systems increasingly become programming suppliers, it may be that the cable systems are just paying themselves and each other for that particular program-been proposed by the LSC staff, is similar to that used by other Federal agencies, such as the Department of Justice, the Department of Education, and the National Institute of Health; all of which buy mind-power, instead of hardware. There is no doubt that details need to be filled in, and I am sure they will be. I feel confident, however, that the competitive awards system adopted by our successors will address the legitimate concerns of current grantees while, at the same time, ensuring that new applicants have a real opportunity to obtain funding.

The real source of the fear of competition is that some people do not trust this Board. Some did not trust the President who appointed us and, although none of us agrees with President Reagan's initial view that the Corporation should be abolished, some people suspected a hidden agenda behind every Board action. There is also the structural problem that we speak with eleven voices. Any one director can make enemies for the whole Board simply by stating his own views, even when those views are not Board policy. As I have already noted, people can mistake communication from the Chairman or the President as a commitment from the Corporation, and they feel betrayed when the Board does not adhere to those supposed commitments. I think these problems have been more common than I would have liked over the last four and one-half years.

These problems can be largely alleviated by placing the program under the control of a single Administrator, appointed by a President you trust, and confirmed by a Senate you trust. That Administrator can make commitments to Congress and to the programs, and he can keep them. There is no doubt that an Administrator will make particular awards to particular programs, and that Members of Congress will disagree with the awards. A Congress that, through its appropriations process, regularly second-guesses executive agencies on research grants for catfish farming is surely capable of exercising proper oversight over the procedures used in making legal services grants. The problem with the current system is that, in guaranteeing refunding for all programs, Congress protects the bad along with the good. That system just does not work. It is time for trust, and it is time for change.

Let me briefly mention some of the side benefits of conversion to a system of competition. If LSC can choose the programs it funds, it has less need for regulations. I know that every rule involves some burden, and I know that any burden is a nuisance for our good programs, but the regulations are designed to control the conduct of programs that would otherwise get out of line. The very nature of rules is that they fall, like rain, on the just and unjust alike. Given the opportunity, I prefer to manage people rather than rules. As Coach Bear Bryant said, you win with people. If you have the right people, all you need is Bear Bryant's do-right rule: Be good or be gone. Competition, carefully overseen by Congress, will maximize the number of good people and minimize the need for rules.

One rule I believe we can discard is the statutory prohibition against the taking of fee-generating cases. The original purpose of that rule, as I understand it, was to protect the private bar from public competition. At our Committee hearing on competition last month, we heard from a member of the private bar who wants to compete for our funds. He said, and I tend to agree, that as long as the private bar can compete equally for LSC grants, it should not be protected from competition from LSC grantees. Indeed, more private attorneys will be willing to compete for our grants and to devote more of their own resources to the task if they believe that doing good will help them to do well. If the restriction on fee-generating cases is removed as part of the introduction of competition, then I would urge the Board to repeal its regulation adopted this year on the recapture of attorneys' fees, since the chief purpose of that regulation was to enforce the restriction on fee-generating cases.

Whatever the mode of delivery, we cannot forget that the local legal services programs are, in fact, Federally funded entities. One of the sources of public resentment against the programs is that their adversaries realize that they are not up against poor people; they are up against the Federal Treasury.

Congress long ago recognized that individual litigants should not be oppressed by the financial power of the Federal Treasury. I see no reason that the legal services program should be any different. It is time to apply the well-established protections of the Equal Access to Justice Act to those who have been sued by legal services programs without substantial justification.

The most common complaint I hear from the public is that it is not fair for one party to receive free legal services, because that lawyer can work you to death without his client having any concern for the cost. Congress can take some of the sting out of this complaint by initiating a program of co-payments by clients, insofar as they are able. A system of co-payments has the additional advantages of increasing the total resources available for legal services and of allocating those resources more efficiently; it would permit poor clients, like most Americans, to vote with their dollars. I realize that our poorest clients have too few dollars to participate, but surely there are many clients who can afford it and who deserve the dignity of helping to meet their own needs. It simply does not make sense for a client whose income is 124 percent of the poverty level to make no contribution to his own case, while an individual whose income is 126 percent of the poverty level must pay for it all.

I remind you that the views I express today are entirely my own. You will not get the Corporation's views on reauthorization unless you have all eleven directors before you at once. Still, I encourage you to solicit the views of my fellow directors as you go about your task. We agree on more things than the press would have you believe, but we each have different perspectives which can be valuable to this Subcommittee. As you go about your task, please feel free to call upon me or any member of the LSC staff for information and assistance. After twelve long years, we want you to succeed.

Mr. Chairman, it has been my pleasure to appear before you today. I would be pleased to answer any questions you or the other members of the Subcommittee may have.

Mr. **Frank**. I do not anticipate having all 11 members of the Board here——

Mr. **Wallace**. I didn't think you would.

Mr. **Frank**. We did ask Mr. Wear to testify. Your request was that we accommodate that. So we didn't think we were doing anything unforward. We thought we were accommodating you.

You talk about a sliding scale, that interests me. Would you have it that people would start paying who are now eligible or people now at the cutoff point, we would allow the Legal Services Corporation to begin to take some of them in on a sliding scale?

Mr. **Wallace**. My own sense is that even below the 125 percent level, people are capable of making some contribution and probably should. They do it in the area of Medicaid. I don't see why they couldn't do it for legal assistance.

Mr. **Frank**. How low would you go? I will tell you, 125 percent of the poverty level is still pretty poor, it seems to me. I like the idea of a sliding scale, but it depends on whether you use that to get money from people. Would you now say that we should go above, I gather, you said if you are at 126 percent, you get cut off. So you would allow people not eligible for any service to get some subsidy of service?

Mr. **Wallace**. I would be willing to consider it, Mr. Chairman. I think that the British system does—you do the consideration, I am not 100 percent opposed to the idea.

Mr. **Frank**. You said it is not fair at 126 percent to be cut off. I assume—I mean, I hope you are not proposing that people at 125 percent and below have to pay something, but the people above 125 percent don't pay anything?

Mr. **Wallace**. I didn't come in here with details. I don't have details. But it seems to me that there might be some room for people over 125 percent.

Mr. **Frank**. You also referred approvingly to the current language of the bill with regard to competition. Are you supportive of that language? I hadn't thought so.

Mr. **Wallace**. As I said, I told you the other options that seemed to appeal to me more; but based on my testimony last time, they don't seem to appeal to the committee. I like competition better than what we have now.

Mr. **Frank**. Now, the language about competition in the Appropriations Bill and the supplemental, you seemed to refer to that approvingly. Should we continue that when we do the appropriations? Pretty soon we are going to be doing the appropriations for the next fiscal year. Since you like it, I assume we should just keep it in there.

Mr. **Wallace**. If you do reauthorization, you ought to try to give more attention to detail.

Mr. **Frank**. Focus on my attention.

Mr. **Wallace**. I am.

Mr. **Frank**. You have had a chance to say what you wanted. Well, before we could do a reauthorization, there will have to be a fiscal 1990 appropriations. You have referred—there is no way we will pass an authorization between now and the first of October. I guarantee you.

The next question is what should be in the Appropriations Bill, say, with regard to competition? You just referred approvingly to the language that was in the appropriations part of Legal Services in the supplemental.

Mr. **WALLACE**. Yes.

Mr. **FRANK**. So I take it you would have no problem if we continued that forward?

Mr. **WALLACE**. There are two parts to that language, Mr. Chairman. One says, "we ought to have competition." I am for that. The other part says, "we ought to wait until there is a new Board." I don't know when that is going to come. I am here to tell you that we are not going to do anything crazy. I think you can trust us. If we are still here in October, we would like to be able to implement competition.

Mr. **FRANK**. So you don't like the Appropriations Act. You don't want us to continue. You would not be in favor of continuing it. You invoked the appropriations language as supportive of your position a little more enthusiastically than you feel. I would like to get the whole record out there.

Just a couple of other points. Equal access to justice. I think that there is a reasonable case for that, and I will be asking the people who testify after you to address that. I will also tell you that based on some of our conversations, I have asked the staff to begin developing language which would put criminal sanctions against any conversion to personal use of Legal Services funds. I don't want to criminalize what might be a legitimate jurisdictional dispute.

We have had questions about accepting older Americans' funds. If they were to accept that and spend it on older Americans, I don't think criminal sanctions would be appropriate to deal with that.

But to the extent that there have been instances of people converting the funds to personal use, enriching themselves and living in an inappropriate luxurious manner, that is appropriate for criminal statutes.

We don't want to say that it is only criminal under Federal law. We don't want to knock the States out of this altogether. I just want to tell you that based on your suggestions there, I have asked the staff to begin drafting such a statute. We will be glad to get your input on criminalizing this.

The last point, the opinion that Mr. Cooper rendered, how much did that cost us?

Mr. **WALLACE**. I will have to defer to the President on that.

Mr. **FRANK**. Mr. Cooper, I believe the former counselor, wrote an opinion, or was he the head of the Office of Legal Counsel of the Attorney General? He wrote an opinion saying that you were unconstitutional. How much did you pay him to tell you you were unconstitutional? How much did you pay him for the opinion?

Mr. **WEAR**. The total effort amounted to approximately $77,000. The actual writing of the opinion amounted to $29,000.

Mr. **FRANK**. And the rest was research?

Mr. **WEAR**. Some of it was research on other issues. We started our relationship with Mr. Cooper by looking at some other issues.

Mr. **FRANK**. What other issues?

Mr. **WEAR**. One of the issues was how independent was the Corporation.

Mr. **Frank**. Of whom?

Mr. **Wear**. Of both the Congress and the executive.

Mr. **Frank**. And how much did you pay him to research that?

Mr. **Wear**. I don't know.

Mr. **Frank**. I would like a breakdown on that. Did he conclude that that wasn't finished?

Mr. **Wear**. His conclusion——

Mr. **Frank**. Let's take this issue. You said he was paid some amount of money to research how independent you could be of the Congress and the President, I gather. What was his conclusion with regard to that?

Mr. **Wear**. His conclusion was that the Corporation was not independent of the Congress.

Mr. **Frank**. Did he write that out?

Mr. **Wear**. No. I didn't pay for a written opinion.

Mr. **Frank**. You paid him to do the research, but you didn't pay him to write it down?

Mr. **Wear**. No, it was clear to me at that point that we didn't need to proceed further.

Mr. **Frank**. I asked you how much you paid for the opinion. You said $29,000 to write the opinion, the rest you paid him you told me to do other stuff. One of the things you said he did was to do research on whether or not you were independent.

You did pay him to do that research; correct?

Mr. **Wear**. Yes, I did.

Mr. **Frank**. But you told him not to write it down? Why not?

Mr. **Wear**. No. What happened was this: As we proceeded down that road, the law firm did some research on that question. It appeared that the Corporation was not independent of the Congress and——

Mr. **Frank**. So you abandoned that?

Mr. **Wear**. Yes.

Mr. **Frank**. That route to accomplish your objective, you ditched it and went on to something else.

Mr. **Wear**. I don't think that is accurate.

Mr. **Frank**. How much did you pay him to tell you that you were supposed to follow the dictates of Congress? What other issues besides that and constitutionality? If you paid him $29,000 to find out that you were unconstitutional—I assume that he ruled it was legal to pay him?

Mr. **Wear**. I didn't ask him that question.

Mr. **Frank**. I wonder if he decided whether it was constitutional to pay him. I would think that the result would be that you didn't have the authority to pay him.

Mr. **Wear**. I didn't raise that question and to my knowledge, he didn't either.

Mr. **Frank**. He accepted the money?

Mr. **Wear**. As best I know.

Mr. **Frank**. One issue was constitutionality, $29,000. One issue was independence. Any other issues?

Mr. **Wear**. There may have been one or two small things.

Mr. **Frank**. If you paid him $29,000 to do just the opinion or the research?

Mr. **Wear**. That was to write the opinion. I think that there was some research separate and apart from that. The total bill was approximately $77,000.

Mr. **Frank**. We understand that. Now, $29,000 was just to write the opinion?

Mr. **Wear**. As I recall.

Mr. **Frank**. What was the hourly compensation fee; do you remember?

Mr. **Wear**. It varied. There were a number of people in the firm involved.

Mr. **Frank**. How long was the opinion?

Mr. **Wear**. We sent you a copy, Mr. Chairman. I don't know how many pages it was.

Mr. **Frank**. Twenty-six pages. So $29,000 just for the writing, it seems like. The research was separate. You don't know how much the research was?

Mr. **Wear**. Mr. Chairman, I suspect that some of the research was included in that.

Mr. **Frank**. That leaves us about $48,000 unaccounted for, and the only research you can tell me that might have accounted for that was telling you whether or not you were independent. I mean, I am disappointed if you paid him $48,000 to conclude that you should—that you weren't independent of Congress and the executive branch. You cannot remember any other issue that he researched? When did he complete this research?

Mr. **Wear**. The opinion was delivered to the Corporation some time in April.

Mr. **Frank**. The opinion only dealt with the constitutionality?

Mr. **Wear**. Yes, sir.

Mr. **Frank**. We have $29,000 for the constitutionality. We have $48,000 unaccounted for. One of the issues was that you had him check on whether or not you were independent. What other issues did he look into? This is not so long ago. You put out that kind of money, it would seem to me that you could remember. You paid him something, and you cannot remember the subject?

Mr. **Wear**. No, I don't think that is accurate.

Mr. **Frank**. What besides the constitutionality and the independence did you pay him for?

Mr. **Wear**. I believe those were the primary issues that he looked at.

Mr. **Frank**. What were the secondary issues?

Mr. **Wear**. I would have to go back and look at the bill.

Mr. **Frank**. You cannot remember any other issues other than whether or not you were independent and whether or not it was constitutional?

Mr. **Wear**. I don't remember any other main issues.

Mr. **Frank**. Any other secondary issues. If this were 10 years ago, I would understand your problem. But we are talking about the last 6 months. Can you remember what your lawyer told you on—whether there were any other secondary issues?

Mr. **Wear**. Not of any great consequence.

Mr. **Frank**. So you paid him $77,000 for this. You paid him a lot of money to tell you that you weren't independent, and then didn't ask him to write it down. I think you should be more specific.

Is it your impression that the $29,000 was most of what he paid on constitutionality? I am still unclear. Some of it was research? Was there an additional amount for research on constitutionality?

Mr. **Wear**. I would need to go back and review the bill.

Mr. **Frank**. I would ask you to do that; exactly how much did you pay him and for how much work on each subject. It seems to me in my oversight capacity rather a poor use of money, particularly that you paid him what must at least be tens of thousands of dollars to tell him that you weren't independent.

Why didn't you use your General Counsel?

Mr. **Wear**. The General Counsel was very much involved in this. He was also involved in a number of other projects at the time. It was not possible to get all of it done in a time frame——

Mr. **Frank**. Did he tell you that? I understand General Counsel disagrees with the decision.

Mr. **Wear**. I believe that is accurate.

Mr. **Frank**. Did he have time to review this? You can assure me that the reason that you asked Mr. Cooper and not the General Counsel is because you didn't think the General Counsel wouldn't give you the answer you wanted?

Mr. **Wear**. That is not correct. He was involved in this early on. I got a draft opinion that I circulated to General Counsel and asked for his comments.

Mr. **Frank**. What were his comments?

Mr. **Wear**. He didn't have any at that time. He started to disagree with the opinion after the fact when some members of the Board began to criticize it.

Mr. **Frank**. You think the General Counsel was unduly influenced by Board members in his conclusion?

Mr. **Wear**. I don't know.

Mr. **Frank**. Is that what you are suggesting?

Mr. **Wear**. I don't know. I am not suggesting that. I note the connection between the events, that is all.

Mr. **Frank**. OK.

Mr. James.

Mr. **James**. As far as accountability, the last time you were here we were concerned about accountability. Have you made any headway on accountability of individual corporations to determine what quality and nature of cases they are in fact pursuing?

Mr. **Wear**. We are making some headway on that, Mr. James. In response to your suggestions in our hearing in March, we are revamping what we call the CSR report, the case report that we use, to try to get more definitive information about what programs are actually doing.

In addition, as I mentioned in my prepared statement, we are looking at the issue of timekeeping, again, to try to determine what programs are doing and also in an attempt to measure the quantity of work that is being done and the amount of time.

Mr. **James**. At this point in time, you have drawn no conclusions as to what the corporations are doing out there, percentage wise or time wise?

Mr. **Wear**. That is accurate, Mr. James. We have not. I have not had enough time to develop that yet, but your point is well taken, and I do intend to get that result.

Mr. **James**. I have heard both at this hearing and earlier in this conversation and in your testimony and Mr. Wallace's, in fact, I will address my question to Mr. Wallace, if I may, the issue of competitive bidding. I notice in this bill that there are some guidelines, but it still doesn't explain what standards you are going to use.

The bill gives you the elements that you were to consider, but does it set up in a perfunctory way or in dollar standards, time standards or experience standards in detail as to how you would submit this on a competitive bid? Instead it delegates that to a matter of rules or regulations. That is the way I read it.

What would you think the rules or regulations would say as far as getting competitive bids from corporations? What would be your guess or best estimate?

Mr. **Wallace**. Mr. James, at this point I cannot give you a best estimate. We have had one committee hearing on this. I don't know to what extent it will be possible to have objective standards to which everyone can agree. I do not consider that an insurmountable obstacle because other Federal grant agencies that I cited in my testimony are capable through the peer review process of fairly distributing grants without having an objective, numerical sort of standard.

We may be able to obtain it, but I cannot tell you how we will do so.

Mr. **James**. Is it a misnomer, then, to say how do you bid on something if you don't have standards?

Mr. **Wallace**. Bidding may be a misnomer. I wouldn't anticipate it being bid in an area of dollars as you would if you were bidding for a paving contract. It is competition through the peer review process, as I say, is fairly common in the Federal Government.

Mr. **James**. Well, I think it is common any time you hire an attorney, period. You select who you want, but you don't have to be subjected to standards, perhaps, but to no prescribed set of regulations. But does not that bill suggest that you have prescribed regulations?

Mr. **Wallace**. I think the bill does make that suggestion. I saw it for the first time this morning wher. I got to Washington, so I have not read it in detail. I hope we can make it as objective as possible, but I don't think you will ever remove subjectivity from what is essentially a subjective process of choosing individual talents.

Mr. **James**. That is one of the problems I have, and in that context, because it is a particular talent or service, that is hard to measure. As desirable as it may be to have these guidelines or rules, still you would be subject to an evaluation or—based on subjective standards.

Mr. **Wallace**. Mr. James, if I may say, I think we can make it more objective than the original grants were. The original grants 10 years ago were entirely subjective and have been grandfathered in. We want to see if we can make it more objective and open things up. I cannot see any defense for the current system where a subjective, initial selection is grandfathered into place forever.

Mr. **James**. In all fairness, do we have a model anywhere in the Federal Government whereby you would have competitive bidding for attorneys' fees?

Mr. Wallace. I don't know the answer to that. I think attorney services are comparable to other services in scientific research, educational research, that are on the basis of talents of individual people. That is what you are buying here, the talents of individual people.

Mr. James. My point is this, you don't have any guidance from looking at any other agency that has rules to hire attorneys; is that correct?

Mr. Wallace. I don't know of any. The staff may, but I don't.

Mr. James. When you hired your attorney to give you a specific report, how was he selected? Did you have rules or regulations as to how you were to select your own attorney that wrote this report?

Mr. Wallace. I don't know how that was done. That was done before I became chairman, so I cannot tell you.

Mr. Frank. Mr. Wear might want to answer that.

Mr. James. I am not trying to be facetious.

Mr. Wear. We selected Mr. Cooper because of his prior experience in the Federal Government. Prior to joining his law firm, he was head of the Office of Legal Counsel in the Department of Justice, the Division of Justice Department that passes on, among other things, the questions of constitutionality that are posed by the President with regard to various statutes.

Mr. James. You wanted to get the most knowledgeable, best person you could?

Mr. Wear. Yes, sir, I think that is right.

Mr. James. So why don't we use that standard in this case of selecting corporations to render service for the poor?

Mr. Wear. I think that that sort of standard would come out in the proposal that we are looking at. We hope to try to find the best providers for the money. The people who can give us the most bang for the dollar in those proposals. We have a draft proposal published in the Federal Register on Friday, May 26, it is volume 54, number 101, page 22787.

Mr. James. How do you know that the Board initially didn't get the best bang for the dollar when they hired the Corporation?

Mr. Wear. They may have in some cases. But I think by instituting this competitive system—this is not aimed at nor will it preclude the existing grantee from successfully competing for the grant. The grantee may, through the competitive process, be the one that is selected.

Mr. James. How long will they have a contract, for example? Have you envisioned that? When you decide you have the best bang for the dollar.

Mr. Wear. The proposals that we are looking at——

Mr. James. Counsel said 3 years?

Mr. Wear. I think it says up to 5 years. It gives the administrator some discretion in that. One of the things that came out of our hearing in Chicago was comment that perhaps a 3-year period was not long enough. The Corporation in its proposal on competition had suggested 3 years. We are certainly not wedded to that 3-year number. If there are good reasons to make it longer or good reasons to make it shorter, we could move in that direction.

Mr. **James.** What bothers me is—in a sense we are talking about a different animal than going out and hiring an attorney. You are dealing with a corporation, they are not even attorneys, are they, the corporate officers who are hiring the young attorneys to do the job; is that correct?

Mr. **Wear.** It varies program to program. Most of the executive directors of these programs are attorneys. I think——

Mr. **James.** I am talking about the Corporation itself.

Mr. **Wear.** Most of the programs are organized as nonprofit corporations. They are usually headed by an executive director who is a lawyer.

Mr. **James.** But he is not accepted as an officer when he is hired. The nonprofit organization of directors, at least that is the way it is in Florida, as I recall.

Mr. **Wallace.** Those boards must be 60 percent lawyers. There are nonlawyers on these boards also.

Mr. **James.** Be that as it may, since it is not 100 percent lawyers, you are not in fact dealing with a legal entity, the Corporation is not a lawyer, per se. It is a nonprofit that is only partially directed and controlled by lawyers.

I have more than 5 minutes worth of questions, perhaps. I will just finish now and come back in a few minutes.

So you are not really dealing purely with a lawyer but with a corporation that hires lawyers?

Mr. **Wallace.** That is correct.

Mr. **James.** There is a question that I want to get into, suits involving agriculture. The concern that I have had or at least that has been expressed to me that you hire young competent attorneys and the Corporation has the best motivation at heart, let's assume that. They do an absolutely superb job for a particular corporation, let's assume that.

For the purpose of this question, let's say that is the case. What bothers me is the incentive situation for the attorneys who are hired in fact on the agricultural cases where you go out to a farmer, violation of a Migratory Workers Act. It is a fee producing case in the first place, the attorneys pay their own salary, and there is no risk factor.

You could win 1 out of 100, and it would not—it would not directly affect that attorney or the client. There is no negative impact on the client to lose. All to gain and nothing to lose, whereas the person accused has everything to lose because he has to pay attorneys' fees and devote his time and business to this undue leverage.

Unlike in a private case where the attorney is controlled by the mere fact that he will oftentimes lose his advance cost and waste time paying his overhead and the Government is not paying for any private practice. So you have the economic, at least an economic weight in the private sector whereas you don't in the public sector. That bothers me.

It seems to have caused in many cases—allegations of frivolous lawsuits, if not frivolous lawsuits. So all of a sudden we find ourselves funding what in many quarters is perceived to be harassment of the American farmer.

Now, it would seem to me that you might consider paying attorneys' fees to the loser, I mean, the loser paying attorneys' fees if you are going to have it so that if the Government loses, the Government would have to pay the attorneys' fees to the man they sued and cost.

Mr. **Wallace**. That is precisely what I have proposed in my testimony. You apply the Equal Access to Justice Act which permits recovery of attorneys' fees when a Government agency proceeds without substantial justification, I think, are the magic words.

Mr. **James**. That is an arbitrary standard. I wouldn't—that won't work. It hasn't in my State where you have the right to file suit for having a—basically a frivolous suit. The judges never find that to be the case and award damages.

What I am suggesting is that you lose, you pay. Because the statutes they are using require the payment of attorneys' fees if he loses to the defendant.

So to keep it balanced, you might consider making attorneys fees automatically payable by the Government if the suit is lost.

Mr. **Wallace**. I don't think this Board could do that, but Congress could.

Mr. **James**. It seems to me that that would take perhaps much of the argument away from that type of suit or it might.

Mr. **Wallace**. Yes, sir.

Mr. **James**. Thank you. We have to go vote.

Mr. **Frank**. Mr. Smith.

Mr. **Smith** of Mississippi. I would like unanimous consent to submit questions to the panelists since I have a conflict in coming back.

Mr. **Frank**. We will hold the record open and make it a part of the record.

[The information follows:]

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August 15, 1989

The Honorable Barney Frank
Chairman
Subcommittee on Administrative Law
and Governmental Relations
Committee on the Judiciary
United States House of Representatives
Room B-351-A Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

Please find enclosed the Legal Services Corporation's responses to post-hearing questions submitted to the Corporation by the late Congressman Larkin Smith of Mississippi. The Congressman asked that these responses be included in the record of the reauthorization hearing for the Legal Services Corporation Act before your Subcommittee on July 19, 1989.

If we can be of further assistance, please let us know.

Sincerely,

James M. Wootton

James M. Wootton
Director, Office of Policy
Development and Communications

JMW:em
cc: Office of Congressman Larkin Smith

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QUESTIONS FOR LSC

1. I understand that the Corporation jointly sponsored a study of a variety of models for the delivery of legal services in San Antonio, Texas. Were there significant differences in the quality of legal services provided by these models? If so, would a competitive grant awards system be one way to force legal services programs to maximize the quality of service provided?

A: During 1985-1988, LSC and the American Bar Association co-sponsored a study of the legal services provided in connection with certain family law cases in San Antonio, Texas. In this study, prospective clients were given a choice between two or more providers of legal services. As part of the study, the legal services that were dispensed were evaluated by three Texas State Bar certified family law experts. The study's project director concluded that, although each of the three service delivery models was sub-standard, the staff attorney model's performance was significantly below that of the other two alternatives -- the private contract and voucher models. However, the report noted that the presence of an outside review panel apparently had a positive effect on the performance of each of the delivery models. The report concluded that an external system for peer review of program performance should be utilized in connection with any legal services program, whether or not it is competitively bid.

2. Are you aware of any studies that support the competitive bidding of Federal grants for legal services? If so, please explain.

A: Several recent studies of the Federal legal services program have identified problems that could be resolved through competitive bidding for legal services grants.

A forthcoming American Enterprise Institute study, conducted by Douglas J. Besharov, finds that the Legal Services Corporation lacks the "necessary management tools" to ensure efficient use of taxpayer funds. AEI analyzed the case closure data of legal services programs from 1975 to 1984 and discovered a substantial decline in productivity, even as the funding for legal services programs was climbing.

The same data also indicate that the priorities of the legal services programs, in terms of cases accepted and closed, vary considerably from the priorities and needs of their indigent clients. For example, the AEI study reports that the percentage of cases devoted to family law issues, including child support, actually declined from 35 percent of total caseload in 1975 to 29.2 percent in 1984, a 17 percent decline. According to the AEI report, "at a time when the poverty caused by family breakdown is at an all-time high, LSC programs seem to be spending less time on family matters."

The AEI report also states that the current system of legal services funding, under which grantees who currently receive LSC grants are guaranteed future funding, provides little incentive for legal services programs to improve their performance or even to be responsive to the needs of their clients. For these reasons, AEI concludes: "The LSC should develop a politically neutral plan to competitively fund grants...." Competition, AEI says, is "a major way to encourage the adoption of more efficient and innovative practices."

Another recent study, cosponsored by the American Bar Association and the Legal Services Corporation and conducted by Steven R. Cox, compared three legal services programs in San Antonio, Texas, to assess their relative cost efficiency and quality effectiveness. The three programs included a voucher program, a competitive-bid contract program, and the traditional staff attorney program. The ability of each of these programs to provide accurate and professional legal services was evaluated by a peer review panel composed of local attorneys experienced in the kinds of cases handled by the programs. The study found that, of the three programs, the staff attorney program was the most costly and was rated lowest in terms of quality of performance by the peer review panel. The report concluded that without the stimulus provided by competition, "there is no guarantee of maximum cost efficiency and quality service."

The author of the report, Dr. Cox, recently testified before the Provisions Committee of the LSC Board of Directors on his findings. He said, "the current funding allocation system creates monopoly markets with a single seller being a staff program." The best means of achieving the objective of providing quality service to as many poor people as possible, according to Cox, is "by creating as much competition between two or more service providers as possible."

Both these studies show that many of the problems inherent in the current funding system, such as lack of quality or responsiveness to clients' needs, could be remedied by competitively awarding grants for legal services.

3. Has the Corporation's recent announcement of competitive bidding elicited any interest among members of the private bar or other groups that might seek funding to provide legal services to the indigent?

A: In response to a single announcement (in the premiere issue of the Corporation's newsletter, The LSC Record) LSC has received over 420 requests for information about the competitive awards system and how to participate. These requests have come from practically every part of the country and from a variety of groups and individuals; such as LSC recipient programs, private attorneys and law firms, law schools, pre-paid legal plans already serving clients, nonprofit groups, and legal corporations. The Corporation continues to receive requests for information daily.

This response demonstrates that there are many members of the private bar and other legal groups that are interested in obtaining grant funds to pay for the provision of legal services to the indigent.

4. Have any other federal agencies successfully instituted competitive bidding?

A: Most federal grants are competitively awarded and the grant process is governed by an extensive body of federal grant law. At a conference sponsored by the American Enterprise Institute in 1986 on the subject of "Maximizing Access to Justice for Poor Persons," one participant reported on the Department of Education's successful initiation of competitive grantmaking and the benefits derived from it. Robert Preston, former Deputy Assistant Secretary, Office of Research and Improvement of the Department of Education, reported on the experience of implementing competition for the National Institute of Education (NIE) grants.

According to Preston, research grants to non-profit organizations similar to legal services grantees were originally awarded on an annual basis by the National Institute of Education without scrutiny or adequate evaluation of the past performance of prior grant recipients.

The National Institute of Education decided to open the process to competition, despite opposition from the then grantees and their Congressional supporters. NIE, however, established a series of blue-ribbon panels of educators and created a two stage peer review. The competitive process disclosed that some existing programs were very good, while other programs were not, and some were, in the words of Mr. Preston, "worthless, almost corrupt." These latter programs were not funded because their own peers rated them very poorly in comparison to more worthwhile programs. Mr. Preston reported there were no complaints about the competition or the partiality of the decisions.

NIE's experience with competition allowed it to weed out those existing programs that abused or wasted taxpayer funds. Preston concluded that it "is vitally important, that [a program]..., however institutionalized and entrenched it is, ought to come up for review every so many years as a scheduled and expected thing."

5. What changes would have to made in the LSC Act to accommodate competition for grant funds?

A: The Legal Services Corporation Act itself would require several minor amendments to implement competition. The Act should be amended to make clear that current recipients do not have refunding rights under Section 1011 of the Act, 42 U.S.C.

§2996j, during a competitive award process. Any new grantee that may be selected would also not have refunding rights.

The current appropriations Act, Pub. L. 100-459, contains restrictions on LSC's authority to award grants under the Legal Services Corporation Act. As an example, under the Legal Services Corporation Act, LSC is authorized to make grants to State and local governments. The current appropriations Act, however, precludes LSC from exercising this authority in that it authorizes the award of grants or contracts only to attorneys or to nonprofit corporations.

6. What purpose would a nominal copayment for legal services serve? Are copayments required for any similar programs?

A: A copayment mechanism for legal services clients would serve at least two purposes. A required copayment, even if nominal, would help to improve client self-esteem, making the client a partner in the legal action.

A copayment would also help to decrease frivolous requests for representation when cases lack merit. Copayments would thus assist programs in concentrating their resources on those most in need. In case of emergency (spouse abuse, etc.) or dire financial need, a copayment could be waived.

The federal government currently allows States to impose nominal levels of cost-sharing (copayments) for some selected services, for example, in Medicaid. There are also legal aid programs in operation, such as the Community Law Center in California, which routinely and successfully use a copayment arrangement with clients.

7. The Massachusetts, Maryland, and a recent national study of the legal needs of the indigent all estimate that roughly 85% of the legal needs of the poor are going unserved. How do these studies demonstrate this unmet need? According to your analysis, what percentage of the needs of the poor are currently being met by the Federal legal services program?

In 1986, the Massachusetts Legal Assistance Corporation conducted a study of the "legal needs" of the poor in that State. The study was designed to fulfill three tasks. First, it was to quantify the legal needs of the poor in Massachusetts. Second, it sought to take an inventory of the existing resources available for meeting those needs. Finally, the study made recommendations for a "Plan for Action" to be implemented by State, local, and Federally funded providers of legal assistance to help satisfy the "unmet" legal needs of the poor. The study concluded that less than 15 percent of the legal needs of the poor was currently being met.

The study, which reports the results of a telephone survey of 1082 households, divides legal need into two categories: recognized legal needs and unrecognized legal needs. Recognized legal needs are defined as instances in which the respondent or a member of the respondent's family had either taken someone to court, been taken to court, or had a problem at some point in time during the five year period covered by the survey that the respondent felt required legal assistance. Unrecognized legal needs are defined as those problems respondents did not realize an attorney might be able to resolve. While the survey for recognized needs appears to have some merit, the attempt to quantify "unrecognized legal needs" raises a number of questions about the design of the survey questionnaire and the validity of its results. Sample questions asked for purposes of identifying unrecognized needs included:

- Bought something that didn't work when you brought it home?
- Ever pay for repairs that you felt were not done right?
- Were unable to get credit cards, loans or insurance?
- Had a problem where heating and plumbing did not work?
- Had a problem with roaches, rats, or other pests?
- Have not gone to a doctor or hospital because you couldn't afford it?
- Been discriminated against in getting loans or credit?
- Owed money to anyone you could not pay?

These questions alone were used to identify 1,076 unrecognized legal problems, or 21 percent of the total problems reported. Among the "most serious unrecognized legal needs" were:

- 215 households, or 19.9 percent of the households surveyed, answered that they had experienced situations in which they "Owed money that could not be paid".

- 15.4 percent of those surveyed reported having experienced utility cutoffs.

- 7.5 percent of the households surveyed experienced problems with rats, roaches, or other pests.

- 11.3 percent of the households surveyed had a problem with getting or remaining eligible for food stamps.

The results of the survey of "unrecognized legal problems" indicated that 10 percent of the respondents reported no "unrecognized needs." The average number of unrecognized needs for the five year period was 4.7 per household, which on an annual basis equals .94 unrecognized legal problems per household per year, under the design of the study.

The .94 figure derived from the survey sample was then multiplied by the 1980 census of poverty for the Commonwealth of Massachusetts, or 340,250, to arrive at roughly 320,000 unrecognized or unmet legal needs per year.

While one might agree with the "recognized needs" portion of the survey, the "unrecognized needs" component renders the study meaningless as a measure of "unmet" legal needs of the indigent.

Consider the differences in results if we analyze the question another way. We know that the respondents in the study reported 173 recognized legal problems for which, for a variety of reasons, they did not obtain legal assistance. To generate a relevant number, we divide the 173 recognized but untreated legal problems by the 1,082 respondents to get a figure of .16 recognized but untreated legal problems per household over five years. We then divide .16 by 5, in order to annualize, and get .032 recognized but untreated legal problems per household per year. Finally, to put this into real case terms, as the study does for its version of the measure of unrecognized problems, we multiply .032 by 340,250 (the poverty population) to get 10,880 recognized but untreated legal problems, significantly smaller than the 320,000 unmet needs reported by the study.

It should be noted, however, that of the total "unmet" needs, respondents reported that they would have been better served with the assistance of an attorney in only 66 percent of the cases, reducing the actual number of total unmet needs actually reported by survey respondents to 7,186, versus the 320,000 reported by the study.

8. Does the current grantmaking system provide the most efficient and effective legal services to clients?

A: Current LSC recipients enjoy "presumptive refunding," regardless of how well or how poorly they provide services to their communities. This monopoly on available funds means that prospective providers who do not currently receive LSC grants are essentially precluded from obtaining funds to serve the poor. Even in cases where actual waste or abuse of federal funds is demonstrated, LSC administrators possess limited remedies. Defunding a program is so expensive and time-consuming that it is impractical in most cases. In one single defunding action, the Corporation was forced to spend over $340,000 and a very large number of staff hours to effect the denial, even though, at each stage of the preceding, the grantee was shown to have produced minimal work with its millions of dollars in grants.

9. Did Professor Cox have any recommendations as to how a competitive system should be designed? If so, what were they?

A: At a June 13, 1989 meeting of the LSC Committee on the Provision for the Delivery of Legal Services, Professor Steve Cox made three specific recommendations concerning the design of a successful competitive system. First, in order to create as much competition as possible in a service area, two or more service providers should be funded in the area. Second, performance evaluations should be required to facilitate meaningful choices for future funding. Finally, less ambiguity in the definition of impermissible uses of Federal funds is essential in order to ensure proper accountability for taxpayer monies.

10. The Wall Street Journal recently published an article by Douglas Besharov of the American Enterprise Institute that reports declining productivity in LSC programs. Does the Corporation have evidence of a decline? What effect, if any, would a competitive award system have on the productivity of legal services providers?

A: Mr. Besharov's statements in The Wall Street Journal represent the findings of the American Enterprise Institute study discussed above. The AEI study analyzed LSC case service data from 1974 to 1985. AEI reports that LSC recipient cases closed without litigation fell by almost 42% between 1980 and 1984. During the same period, cases closed in negotiated settlement with litigation also declined, by over 14%. This decline in productivity occurred during a period when LSC grants to legal services programs reached an unprecedented high.

Mr. Besharov concludes from the data that "most LSC resources go to cases in which relatively little time is spent helping clients with serious problems..... If so, this is a matter of potentially great programmatic and policy significance."

Competition would allow the Corporation to award funding to those programs that can demonstrate that they can effectively and efficiently provide legal services to the indigent. Programs whose case service data and other indicators show that they are less productive than other programs or less responsive to their clients' requests would be regarded less favorably in a competitive process. Grant applicants would therefore have more incentive to make the best use of their resources to serve the poor population in their service area.

A competitive system would also permit other prospective legal services providers, many of whom have established records of cost efficient delivery of legal assistance, to apply for grants to provide legal services.

11. What, if anything, has LSC done in the way of designing a workable and efficient process to administer a competitive grant awards system?

A: LSC has begun research and staff review associated with a system for the competitive award of legal services grants and contracts in order to lay groundwork for a Board of Directors appointed by President Bush and confirmed by the Senate. This research includes an analysis of other Federal and State programs that use a competitive award process. LSC published an advance notice of proposed rulemaking and received forty-three written comments in response. Further, the first of a series of hearings on the competitive award system was held in Schaumburg, Illinois in June, 1989. Sixteen witnesses, including LSC staff, testified before the Corporation's Committee for the Provision of Legal Services.

12. Under a system of competitive bidding, would current programs enjoy a built-in advantage over prospective new providers?

A: Under the competitive award system envisioned by LSC, all applicants will be treated equally; there is no intent to "stack the deck" for or against any applicant. Current providers may have an advantage if they can demonstrate efficiency in the provision of legal services.

13. Can LSC ensure that the implementation of competition will not result in the disruption or dislocation of services to the poor?

A: LSC does not believe there will be any material disruption in service. In those cases in which a change in providers is made, a transition period will be established to prevent disruption of representation. Such a transition is similar to those put into place when a recipient is defunded, and could be handled in a similar manner. Even if it is necessary for a client to change attorneys because of the competitive award, the client's wishes as to who should represent him or her will be taken into account and the clients' interest will continue to be represented.

Mr. **Glickman**. Why don't we go ahead and start. Is Mr. Wear still here?

Mr. **Wallace**. He is here.

Mr. **Glickman**. I think he wanted to submit an opening statement for the record. All right.

Without objection, his entire statement will appear in the record. I would yield to Mr. Cardin. You may start.

[The prepared statement of Mr. Wear follows:]

PREPARED STATEMENT OF TERRANCE J. WEAR, PRESIDENT, LEGAL SERVICES CORPORATION

Good morning, Mr. Chairman and members of the Subcommittee. I am Terrance J. Wear, President of the Legal Services Corporation. I appreciate the opportunity to appear before you again and to participate with the Subcommittee in the reauthorization of the Federal legal services program. As you know, the program's authorization expired in 1981. Subsequently, the program has been operated on annual appropriations and a series of appropriations "riders" that have made long range planning difficult. The uncertainty prevalent in this environment should be resolved through the reauthorization process.

As I noted in my testimony before this Subcommittee in March, I believe that a reauthorization bill must contain reforms in order to insure the integrity of the Federal legal services program. A bill that provides for program accountability will greatly improve both the image and the acceptability of the legal services program among a large number of Members of Congress, as well as the large numbers of Americans who pay for the program with their tax dollars.

When I testified previously, I referred to several instances of abuse identified by the Corporation's staff and by the programs themselves, under the terms of a grant condition requiring that such activity be reported to the Corporation when it becomes known to the program. Subsequently, the Corporation submitted additional examples of waste, fraud, and abuse to the Subcommittee in response to inquiries made during and after the March hearing. The Corporation's submission covered 16 cases in which employees of programs were either alleged to have, or found to have, committed fraud, embezzled program funds, or abused the public trust in some other way. Several of these matters are pending with the Department of Justice. Others were referred to DOJ, but prosecution was declined for lack of an applicable Federal law. Until Congress clarifies the ambiguities in the statutory language that lead to these interpretations, I do not believe we will be able to rein in the fraud.

WASTE, FRAUD, AND ABUSE

Mr. Chairman, I would like to update the instances of waste, fraud, and abuse that have come to light since the Subcommittee's March hearing and offer my thoughts on what is needed in a reauthorization bill to eradicate such activities. As one might expect, most of these cases involve individuals who are paid with LSC funds, rather than program wide conspiracies. However, we have found that these instances might have been avoided had program management put into place the financial controls necessary to discourage or detect the misappropriation of these funds.

One program, California Rural Legal Aid, reports in a memo to its Directing Attorneys that, during 1987, it suffered three incidents of misappropriation of client trust funds, resulting in the theft of up to $13,400. California Rural Legal Aid dismissed the parties responsible for these thefts and sought their prosecution by local authorities. As the Executive Director noted in his memo, California law requires that "once CRLA obtains knowledge of the actual commission of a crime, it becomes 'conspiratorial' to agree to nonprosecution and subjects the agency to punishment under criminal law." The Executive Director also noted that the program would take immediate action to establish a policy to deter future thefts of client trust funds. The policy change was to be followed up with selective audits of client trust funds program wide.

This represents responsible action on the part of the California program and the program's Executive Director should be commended for his efforts. The key, I submit, is the incentive provided through the California statute referred to above. A similar provision at the national level could be used to punish, and thus deter, instances of fraud and abuse.

Just last month, Western Nebraska Legal Services, Inc. advised the Corporation of an apparent theft, loss, or embezzlement of LSC funds that was uncovered during a fraud audit conducted by a special committee of its Board of Directors. The audit revealed that the program's former Executive Director allegedly filed false travel claims and claims for expenses already covered by per diem payments that the program had made to him. In addition, the audit disclosed that the former Executive Director maintained an "outside law practice" in which he represented clients eligible for legal services and charged them fees and also represented criminal defendants and collected fees, both in direct violation of LSC's regulations. The Board's special committee is investigating the false claims allegations; but has already substantiated the "outside law practice" allegations with cancelled checks made out to the former program director for immigration work done on behalf of eligible clients and court pleadings showing the former Executive Director's involvement in criminal proceedings.

Again, the Nebraska program's new Executive Director assures the Corporation that the program will turn over its findings to the local authorities and seek prosecution. Again, this is responsible action on the part of the Nebraska program, but it is not clear whether the former Executive Director's actions, while reprehensible, amount to violations of criminal law. I am also sorry to report that the former Executive Director of the Nebraska program has been hired as the Executive Director of another legal services program. A recent unannounced investigation of this individual by LSC staff suggests that the same pattern of activity is occurring at his new location. In fact, during the interviews with the individual, the staff found evidence that he was continuing his outside law practice from his new location.

In another case involving Legal Aid Society of Northeastern New York, LSC found that the program's bookkeeper had paid himself an extra $12,000 over the period 1986-1988. Documents retrieved during a visit to the program in early June indicate that the bookkeeper took advantage of the program's lack of financial controls to misappropriate these funds. The misappropriation was detected during an examination of the bookkeeper's W-2 forms in his personnel file. Further examination revealed that the program had not maintained vendor files, that its auditor had not conducted a 1987 audit, and that the program has no fiscal records for calendar year 1989. The program reports that it has now entered into an informal agreement with the bookkeeper to repay the stolen funds. I should also note that the Legal Aid Society of Northeastern New York was required to report this misappropriation to LSC under the terms of a grant condition that has been in place since January 1, 1989, but failed to do so.

This case is an example of the stark contrast in anti-abuse policies across legal services programs. While CRLA appears to take these matters seriously and is implementing procedures to minimize the likelihood of their recurrence, the Legal Aid

Society of Northeastern New York appears to be in fiscal chaos. To remedy situations like this, this Subcommittee should make the criminal and civil laws that now apply to grant recipients receiving other Federal funds also apply to legal services programs that receive funds from LSC. Only this action will ensure the integrity of the legal services program throughout the nation.

During the March hearing, I spoke of my aversion to abuses that leave the Federal legal services program poorer. While we need institutional reforms that would streamline program information transmission and assimilation, our monitoring efforts on this front appear to be improving. In fact, the increased professionalism of our staff appears to have alarmed the Executive Director of one program who, in a letter to Mr. Bucky Askew of the National Legal Aid and Defender Association, noted that the LSC staff who had just visited his program "were very well prepared and very focused in their work...they have the potential for doing great damage with these visits as they get better prepared...." To the extent that fraud and abuse exist, I expect we will do some damage. After all, it is our job to root it out. (Note: A copy of the letter to Mr. Askew is appended to this testimony.)

ROLE OF THE LEGAL SERVICES PROGRAM

A new authorization bill for the Federal legal services program must address a most basic question: What is the proper role of a legal services program? Originally, the Federal legal services program was established to enable individuals, who were too poor to afford to pay for an attorney, to obtain the legal assistance they needed. For many poor persons who may be facing bankruptcy, eviction, divorce, or the lack of child support, this need is critical. Several studies demonstrate that only a small percentage of the demand for legal assistance is met, yet our limited resources are not used to their best effect. Consequently, it is important to establish the provision of day-to-day legal assistance as the priority of the Federal legal services program. Other activities serve only to siphon resources away from the essential purpose of the program.

Lobbying and involvement in political issues are examples of activities that siphon away resources. Redistricting and reapportionment are also examples of inherently political actions that absorb extensive staff time and effort that could be used to provide basic legal assistance. Redistricting is an activity that affects an entire political community, with necessarily partisan implications; redrawing political boundaries involves many interests not peculiar to the poor. Moreover, there are many public interest law firms and groups that actively pursue such activities as redistricting. It is a mistake to permit limited legal services resources to be used by a program to pursue these matters, or to promote its own particular view of politics. A new authorization for the Federal legal services program should clarify and strengthen prohibitions on redistricting litigation, lobbying, and other political activities.

One recurring problem with the current structure of LSC is that even though there are clear restrictions in the LSC Act and regulations against many of these political activities, those restrictions are easily evaded by the legal services programs. The programs are able to exploit loopholes in the statutory language that are wide enough to render restrictions on political activity meaningless. If a program wants to lobby against, for example, the nomination of Judge Robert Bork, the program simply claims it is using non-LSC funds. The program may be using telephones, desks, and offices paid for by the taxpayers, and using funds raised on staff time paid for by the taxpayers; but for purposes of evading the restrictions on the use of taxpayers' funds, the program claims the activities are funded with non-LSC funds. It is impossible to sort out this kind of shell game played by the programs.

The Corporation has made several efforts to close this loophole by clarifying regulatory language concerning the use of non-LSC funds. Congress should require that any program seeking LSC funds must agree not to use other funds for purposes proscribed by the LSC Act and regulations.

TIMEKEEPING

I believe that both the poor and the American taxpayers would be well served by the implementation of a standardized system of timekeeping for legal services programs. The objectives of such a system are twofold. First, a system of timekeeping will identify, on a contemporaneous basis, legal assistance funded by LSC versus legal assistance funded through non-LSC sources. Second, the system would provide information on the allocation of funds across the various service dimensions--including direct services to clients, overhead, and administrative functions. In short, a timekeeping system would provide a far more accurate picture of day-to-day operations than currently exists and would be an effective yardstick to measure program performance and to compare one program with another.

Timekeeping provides benefits to programs, to the Corporation, and to Congress. Timekeeping encourages programs to provide services to clients in the most effective and economical manner. A meaningful record of efficient and responsive service could increase opportunities for legal services programs to obtain funding from non-LSC sources. The Boards of Directors of Legal services programs could use time data to assess program effectiveness and to make allocations of funds to specific field offices within their programs. Program managers would also be better informed on staff efforts and better able to make recommendations to their Boards of Directors as to the allocation of scarce funds.

The Corporation would benefit from timekeeping in many ways, not least of which would be in its ability to "insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance..." as is required by Section 1007 (a)(3) of the LSC Act. At the present time, without a system of timekeeping, the Corporation is unable to make this assurance. Appropriate systems of timekeeping would yield meaningful information about program performance and would enable the Corporation to measure a given program's performance against an objective standard and to compare one program with another.

Finally, a system of timekeeping would provide a statistical mapping of program characteristics, from casetypes to clients served, allowing the Corporation to reduce its expenditures on costly, laborious on-site visits. This information is vital to ensure that clients across the nation receive the services to which they are entitled in the most efficient and effective manner.

Information gleaned from an effective system of timekeeping could benefit Congress by enabling the Corporation to respond to diverse Congressional inquiries in a more timely, comprehensive manner. A more accurate picture of field operations could also have an impact on Congressional funding decisions. Finally, timekeeping information could give Members of Congress an indication of the extent to which the legal services program is meeting goals established in legislation.

CLASS ACTIONS AND POLITICALLY MOTIVATED LITIGATION

Any reauthorization measure should also provide stronger language that would require legal services programs to consider more carefully whether or not to bring class actions or to engage in politically motivated litigation. Two cases which I will outline here suggest that ideology plays a role in the decisions made by local legal services programs as to which cases and clients are accepted for legal representation.

Consider a case involving California Rural Legal Aid now in its tenth year. The program brought suit against the University of California at Davis in 1979 for engaging in agricultural mechanization research. On behalf of 19 agricultural workers, CRLA maintained in its suit that the university's research would replace workers with machines, eliminate the small farm, concentrate production and harm consumers, reduce the quality of life by raising the scale of farming, and "thwart the efforts of farmworkers to act and bargain collectively concerning their working conditions." The program has spent over $1 million on a case that many would agree is an ideologically motivated, misguided effort to reverse the course of technological progress. I personally believe we could have accomplished much more by spending the $1 million to help poor women and children obtain child support from absent fathers.

On April 18 of this year, I received a complaint from Congressman Huckaby about a suit filed by Florida Rural Legal Services against the Northern Louisiana Growers Association. The Congressman's complaint alleges that the suit was brought to harass a group of growers who had fulfilled all their obligations under the migrant worker laws, but who had failed to provide work for a number of H-2 workers who had arrived unannounced several weeks before their services were required. The complaint notes that an on-site inspection by the Department of Labor found no violations of the Migrant and Seasonal Agricultural Worker Protection Act or pertinent regulations. Congressman Huckaby asks how an attorney in Southern Florida is "more qualified than the Department of Labor to know what regulations may have been violated thousands of miles away, two years ago, in another state?" That I cannot answer. I would agree, however, that LSC shared interest of cable operators and programmers in maximizing profits (producer surplus) and inflating cable rates (minimizing consumer surplus) proved too strong.9/ Instead of competing away the monopoly and monopsony profits by encouraging the entry of competitors into both programming and cable operations, these two functions have become integrated, thereby freezing out independent competitors.

Without comparable viewing packages available to the public, competitive market forces are not strong enough to pressure hard bargaining between independent cable operators and programmers or to threaten integrated programmer/operators with loss of market share sufficient to drive prices down.10/ The integrated companies actively seek to reinforce their market power in programming and the monopoly at the point of distribution, enhancing their ability to maximize producer surplus. In the cable industry, vertical integration has been combined with horizontal concentration and a vigorous campaign of anticompetitive actions to ensure market power at the point-of-sale.

> Thus, for example, through vertical integration MSOs may deny programming to

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9/ Although the recent attitude toward vertical integration has been to presume that it is efficiency enhancing, a strong set of counter arguments is emerging, particularly as it affects the cable industry. See Thomas G. Krattenmaker and Steven C. Salop, "Anticompetitive Exclusion: Raising Rivals' Cost to Achieve Power Over Prices," The Yale Law Journal, 92:2 (1986); and J. A. Ordover, A. O. Sykes, and R. D. Willig, "Nonprice Anticompetitive Behavior by Dominant Firms Toward the Producers of Complementary Products," in Franklin M. Fisher (Ed.), Antitrust and Regulation (Cambridge: MIT Press, 1985).

10/ The importance of taking these types of arrangements into account in assessing the effects of market structure has been emphasized in the context of merger analysis. See J. A. Ordover, A. O. Sykes, and R. D. Willig, "Herfindahl Concentration, Rivalry, and Mergers," Harvard Law Review, 95 (1982).

> alternative cable technologies such as MMDS ("wireless cable"), which constitute a head-on threat to cable's control of the local market. Such anti-competitive tactics are easier to carry out when a distributor (a large MSO, for example) also owns an important programming source. In addition, as the MSO becomes larger, the more credible become its threats to disadvantage the program vendor at the distribution level if it refuses to cooperate with the distributor's programming tactics. Such a disadvantage could be produced, for example, by placing the vendor's program on a high channel where it is less likely to be viewed by subscribers, or by refusing to carry the service. Other tactics could include overpricing a particular program or not including it in the optimal tier.11/

HORIZONTAL CONCENTRATION, VERTICAL INTEGRATION AND JOINT VENTURE INTERCONNECTION ARE SPREADING RAPIDLY IN THE CABLE INDUSTRY

The largest cable operator, Tele-Communications Inc. (TCI), now accounts for almost one quarter of the market.12/ This does not take into account its close association with the fourth largest firm (Comcast Cable Communications) through joint ownership of an entity that would be the sixth largest operator (Storer Cable Communications) if it had an independent existence (Comcast and TCI also overlap in a large basic program service, QVC Network). If this group is considered together, the dominant firm controls almost one-third of the market (a 30 percent market

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11/ Ordover and Braunstein, op. cit., p. 574.

12/ Testimony of Jack Valenti, President, Motion Picture Association of America, Subcommittee on Telecommunications and Finance, United States House of Representatives, May 11, 1988; see also CableVision, Top 100 MSO's; Article entitles "Cable Rate Hikes Spreading," in Competitive Issues in the Cable Television Industry, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988.

share).13/

The second largest firm (Time Inc., owner of American Television Communications [ATC]) has proposed to merge with the sixth largest firm (Warner Cable Communications) and press accounts indicate that these two have jointly acquired the nineteenth largest firm (Centel Communications). This group represents over one-seventh of the cable market (a 14.5 percent market share).14/

TCI has followed a strategy of first dominating the cable operators market and then expanding backward into programming. It doubled its market share after deregulation through acquisitions.

> TCI and other operators are big shots in their franchise areas because theirs is usually the only game in town. Operators don't have direct competition, and they have been able to set their own rates since January, when the industry was deregulated. Operators own the hardware -- cable and overhead wire -- that feeds the software, or programs, to subscribers' homes. An operator can break a local low rate station, especially a public or independent broadcaster, by refusing to carry its programs. Local subscribers see only the national services operators choose to buy, such as Christian Broadcast Network, the Spanish-language Univision, Inc. programs, kid's shows on Nickelodeon, the Black Entertainment Television Network, or Arts & Entertainment Network.
>
> But Malone is more formidable than any other cable operator because it's virtually impossible to

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13/ The importance of considering the reactive behavior of rivals has been stressed in the antitrust context by Richard Schmalensee, "Another Look At Market Power," Harvard Law Review, 95:1982; Janusz A. Ordover, Alan. O. Sykes and Robert D. Willig, "Herfindahl Concentration, Rivalry and Mergers," Harvard Law Review, 95:1982; Louis Kaplow, "The Accuracy of Traditional Market Power Analysis and A Direct Adjustment Alternative," Harvard Law Review, 95:1982 Ordover,

14/ Valenti, op. cit.

> make money from a cable network without TCI's 8 million subscribers. Indeed, Malone's support has launched fledgling networks, and his opposition has kept other from getting off the ground.15/

Time's strategy appears to be taking the opposite path.16/ Its market power results from its ownership of the number one and number four ranked pay services (HBO and Cinemax respectively) and the second largest cable operator (ATC). Time alone accounts for approximately 45 percent of the pay service market.

Thus, we have one firm (TCI) dominating the operator segment and integrating up-stream into programming. We have a second firm (Time) dominating the programming segment and integrating down-stream into cable operations.

The two dominant firms are also thoroughly interconnected through a series of joint ventures. With independent sources of market power, they can avoid competing head-to-head in the marketplace by maintaining exclusive franchises and exclusive distribution of programming. With this basic structure, joint ventures become a mechanism for enhancing market power and creating ever larger barriers to entry for other potential competitors.17/ The task of mounting a simultaneous entry at the level of programming and cable operation becomes ever more formidable as the joint ventures proliferate more specialized programming while dividing the marketplace around specific franchises and programming.

15/ "The King of Cable," Business Week, October 27, 1987, p. 111.

16/ Time's dominant position in programming and its leading role in the effort to prevent the entry of TVRO suppliers, as well as to provide overbuild insurance, not to mention its greater tendency to refuse to deal and discriminate, indicate its preference for this strategy.

17/ Krattenmaker and Salop, op. cit., pp. 238-240.

As we learned from airline deregulation, creating networks can establish formidable barriers to entry.[18] Similarly, the integration of programming and cable operations poses a barrier in the cable industry. We know that the airline industry is not even contestable, not to mention competitive.[19] One cannot simply buy or rent a plane (or threaten to) and enter markets at will. One must have landing slots and gate space at both ends of the route and fair access to the stream of passengers who would like to make the trip to successfully enter. Similarly, one must have access to quality programming at competitive rates and potential subscribers if one is going to enter the cable business. Vertical integration and joint ventures make this task increasingly difficult.

TCI and Time also exert their market power through multiple interconnections of ownership shares. TCI and Time each hold interests larger than 5 percent in Cable Value Network, the Fashion Channel, Black Entertainment Network, Cable New Network, Turner Broadcasting and Headline News (see Exhibit 1). TCI is

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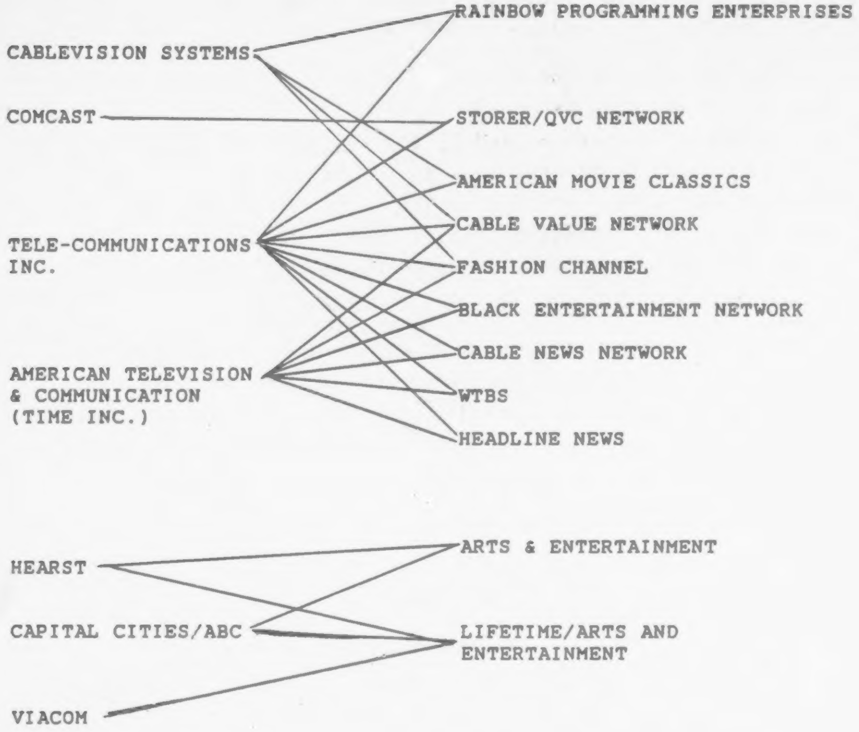
[18] Chris Welles, "Is Deregulation Working?" Business Week, December 22, 1986, raises the issue of networks. M. E. Levine, "Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy," Yale Journal of Regulation, 4, 1987, points out that virtually no one foresaw the immense importance of hub and spoke organization. He points out numerous other failures of both the competitiveness or contestability models to describe the airline industry.

[19] Contestability theory held that if entry and exit from an industry were completely costless, the mere threat of entry would discipline the incumbent firms. Even if only one firm were in the market, it could not behave as a monopolist. This theory has been thoroughly discredited. Empirical tests of the theory in the airline industry, which was supposed to be the quintessential case of contestability, consistently reject the theory. See S. Morrison and C. Winston, The Economic Effects of Airline Deregulation (Washington, D.C.: Brookings Institution, 1986), Chapter 6; E. E. Bailey, D. R. Graham and D. P. Kaplan, Deregulating the Airlines (Cambridge: MIT Press, 1985) Chapter 9; D. R. Graham, D. P. Kaplan, and D. S. Sibley, "Efficiency and Competition in the Airline Industry," Bell Journal of Economics 14, 1983.

EXHIBIT 1:

JOINT VENTURES IN PROGRAMMING AMONG MAJOR CABLE INDUSTRY FIRMS


CABLEVISION SYSTEMS
COMCAST
TELE-COMMUNICATIONS INC.
AMERICAN TELEVISION & COMMUNICATION (TIME INC.)
RAINBOW PROGRAMMING ENTERPRISES
STORER/QVC NETWORK
AMERICAN MOVIE CLASSICS
CABLE VALUE NETWORK
FASHION CHANNEL
BLACK ENTERTAINMENT NETWORK
CABLE NEWS NETWORK
WTBS
HEADLINE NEWS
HEARST
CAPITAL CITIES/ABC
VIACOM
ARTS & ENTERTAINMENT
LIFETIME/ARTS AND ENTERTAINMENT

NOTES AND SOURCE: Only joint ventures are shown, wholly owned programs are not shown, but are counted in Exhibit 2 in the appropriate column. "Testimony of Jack Valenti, President of the Motion Picture Association of America," *Subcommittee on Telecommunications and Finance, Energy and Commerce Committee, United States House of Representative*, May 11, 1988; "Vertical Integration," in *Competitive Issues in the Cable Television Industry*, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, pp. 416-417.

interconnected with Comcast in both the Quality Value Network and Storer Cable Communications. It has multiple interconnections with Cablevision Systems in American Movie Classics and Cable Value Network, as well as the Fashion Channel. The latter two overlap with the Time's ownership interests.

With the pending merger of Time and Warner and proposed acquisition of Centel, this becomes a thoroughly dominant interconnected set of companies, led by the two largest in the industry -- one rooted in programming, the other in cable operations (see Exhibit 2). This group accounts for 47 percent of all subscribers, 23 percent of all basic service subscriptions and 67 percent of all pay services (including both monthly pay service and pay-per-view service).

Based on this view of the industry, the Time/Warner merger fails even the lenient test of excessive concentration used by the Department of Justice.19/ When viewed at the local level, the impact of that merger on even a very large market like the New York metropolitan area is worse.20/

Other cable operators are touched by this web of interconnections. Interestingly, the equity ownership of

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19/ The Hirschman-Herfindahl Index (HHI) is used by the Department of Justice in its *Merger Guidelines* to assess the impact of mergers). For cable operations at the national level HHI is about 900 when joint ventures are not taken into account. Adding the Time/Warner merger raises it by about 60 points, which does not trigger DOJ scrutiny. However, arguing that the interconnections between the firms reinforces their mutuality of interests and enables them to effectuate reinforcing rather than rivalrous behavior (as per the sources cited in note 13 above), the pre-merger HHI rises to well above 1900. Warner is not tied into this web by equity ownership above five percent. Adding the merger to the interconnected web of companies raises the HHI over 200 points. This fails the *Merger Guidelines* test.

20/ The *Comment of New York State Consumer Protection Board in the Time/Warner Merger*, April 5, 1989 demonstrated a much higher level of concentration in the New York City metropolitan area.

EXHIBIT 2:

NATIONAL MARKET SHARES OF MAJOR INTERCONNECTED COMPANIES IN CABLE SYSTEMS, BASIC SERVICE AND PAY SERVICE PROGRAMMING

COMPANY	CABLE SUBSCRIBERS (000,000)	BASIC SERVICE SUBSCRIBERS (000,000)	PAY SERVICE SUBSCRIBERS (000,000)
CABLEVISION SYSTEMS	1.0	1.7	6.3
TELE-COMMUNICATIONS INC.	10.8	26.0	0
AMERICAN TELEVISION & COMMUNICATION (TIME)	4.5	0	23.9
WARNER	1.4	0	0
COMCAST	1.4	0	.2
JOINT VENTURES	2.0	186.0	10.3
TOTAL 5 COMPANIES	21.1	212.0	40.7
VIACOM	1.1	162.3	11.6
HEARST	.1	0	0
CAPITAL CITIES/ABC	0	48.8	0
JOINT VENTURES	0	65.4	0
TOTAL 3 COMPANIES	1.2	265.5	11.6
NATIONAL TOTAL	44.7	930.0	60.1
5 COMPANIES AS % OF NATIONAL TOTAL	47.2	22.7	67.4
3 COMPANIES AS % OF NATIONAL TOTAL	2.7	28.5	19.3

SOURCE: "Testimony of Jack Valenti, President of the Motion Picture Association of America," *Subcommittee on Telecommunications and Finance, Energy and Commerce Committee, United States House of Representative*, May 11, 1988; "Vertical Integration," in *Competitive Issues in the Cable Television Industry*, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, pp. 416-417.

programming joint ventures which is allocated according to subscribers tends to reinforce the market power of the dominant firms.[21]

There is a second interconnected series of companies that hold overlapping ownerships of ESPN (Capital Cities/Viacom) and Lifetime/Arts and Entertainment (Viacom/Hearst). This smaller group accounts for two percent of cable subscribers, but 27 percent of all basic subscriptions and 19 percent of pay service subscriptions.

Combining these two groups we find that about a half-a-dozen firms account for over 50 percent of subscribers, 50 percent of all basic service subscriptions and almost 90 percent of all pay for service programming.

COMPETITION FOR CABLE IS WEAK AND HAS BEEN FORECLOSED BY THE ANTICOMPETITIVE PRACTICES OF THE CABLE INDUSTRY

Head-to-head competition -- two cable wires passing each home -- was promised at the time of deregulation, but has failed to materialize.[22] Only about one-in-two hundred cable operators faces any direct cable competition and an even smaller percentage of subscribers enjoys the consumer benefits of such competition.[23]

Many existing cable operators, in concert with their programmer-owners, have engaged in vigorous anticompetitive actions to prevent head-to-head competition (which is described pejoritively by the industry as "overbuilding"). Potential competitors have been thwarted by cable operators-programmers denying them access to consumers and programming or by overcharging for or restricting the use of programming that is made available.24/

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[21] Competitive Issues in the Cable Television Industry, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, pp. 113-116.

[22] Subcommittee on Communications, Committee on Commerce, Science and Transportation, United States Senate, 99th Congress, 1st Session, February 16-17, 1983.

[23] "Testimony of Gary R. Chapman, on Behalf of the National Association of Broadcasters," in Competitive Issues in the Cable Television Industry, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, p. 525.

A similar pattern typifies the response to close substitutes. Competition from close substitutes could be provided by proven technology like wireless cable, which has a multi-channel capacity that begins to approach that of cable, or TVRO (satellite dish) services. These have been squelched by a variety of tactics. Outright refusals to deal and exclusivity arrangements for programming have limited the ability of these near competitors to offer services that are comparable.25/ Discriminatory pricing or terms of service undercut the competitive viability in other instances.26/

24/ The concern about overbuilding among MSOs and some of the efforts to prevent it are mentioned in *Competitive Issues in the Cable Television Industry*, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, pp. 152-157.

25/ *Testimony of Mark Foster, Chairman, Microband Companies Incorporated Wireless Cable of New York*, before Charles Schumer and Richard Kessell, March 6, 1989, p. 3; *Competitive Issues in the Cable Television Industry*, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, pp. 118-122, 127, 152-174.

26/ "Testimony of Mark Foster, Chairman and CEO of the Microband Companies Incorporated," in *Competitive Issues in the Cable Television Industry*, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, pp. 388-403. *Competitive Issues in the Cable Television Industry*, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, pp. 118-122.

HBO's effort to offer overbuild insurance is a revealing example, as recently described in the Hart-Scott-Rodino filings of the New York State Consumer Protection Board in the Time/Warner merger.

> Under that plan, HBO exclusivity would only be available in areas where overbuilds (head-to-head competition) had not occurred. This effort clearly suggested a desire to prevent entry of competitors at the distribution level.
>
> The plan further tied the exclusive rights to HBO to two of Time's less popular products, Cinemax and Festival. It also explicitly attempted to tie distributors to HBO since affiliates who were offered exclusivity "may not hold exclusive cable rights for any other pay or basic programming service whose programming consists primarily of theatrical films."
>
> The proposal was explicitly and selectively anti-competitive, intended to prevent overbuilding. Justified as an effort to promote "an effective environment for the long term growth of our programming services," the problem with overbuilds was seen as a disincentive for local operators "to market and promote our services."27/

Competition from near substitutes has also been impeded. Time Inc., parent of HBO, was also in the forefront of the effort to prevent TVRO operators from gaining access to programming.28/

27/ Consumer Protection Board, op. cit.; John Wolf, "Cool Response to Exclusivity Offers," in Competitive Issues in the Cable Television Industry, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, p. 157; Debbie Harrod, "Rainbow Offers Ops Exclusivity Contracts," Competitive Issues in the Cable Television Industry, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, p. 156.

28/ Chan-Olmsted, op. cit., p. 11.

Virtually all of the major programmers deny access to or discriminate against "wireless cable" operators in provision of programming.29/

In a recent study of programming, the NTIA argued that integration does not affect the programming available to subscribers.30/ That conclusion is at odds with more rigorous analysis and, in fact, with the NTIA's own data.31/ NTIA reached the wrong conclusion because its analysis included some rather small integrated systems and did not focus on the two different bases of market power we have identified or the multiple interconnects between groups of companies.

The NTIA data show that Time Inc.'s affiliate, ATC, clearly has discriminated against the programming of its major rival, Viacom (see Exhibit 3). ATC was more likely to carry its own programming -- all four programs were more likely to be carried by its affiliates than non-affiliates.32/ At the same time, ATC's affiliates were less likely to carry one of three of Viacom's programs than non-affiliates. Viacom affiliates were more likely to carry two of its own three programs.

The differences in the percentage of stations carrying the competing programmers' offerings are quite large, with the exception of HBO, which is the overwhelmingly dominant pay

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29/ Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, pp. 118-122.

30/ National Telecommunications and Information Administration (NTIA), Video Program Distribution and Cable Television: Current Policy Issues and Recommendations (U.S. Department of Commerce, June 1988), Chapter 6.

31/ Michael Salinger, A Test of Successive Monopoly and Foreclosure Effects: Vertical Integration between Cable Systems and Pay Services (Graduate School of Business, Columbia University, September 1988).

32/ The text mentions only statistically significant differences. The table shows the direction of all differences.

EXHIBIT 3:

TENDENCY OF MAJOR INTEGRATED PROGRAMMERS TO CARRY RIVAL PROGRAMS

		AFFILIATES PROBABILITY OF CARRYING PROGRAMMING	
		ATC AFFILIATES	VIACOM AFFILIATES
SERVICES			
PAY SERVICES			
ATC PROGRAMMING			
PAY SERVICE:	HBO	+	(+)
	CINEMAX	+	(-)
BASIC SERVICE:	USA	+	(-)
	BET	+	(+)
VIACOM PROGRAMMING			
PAY SERVICE:	SHOWTIME	(-)	+
	TMC	(-)	(-)
BASIC SERVICE:	LIFETIME	-	+

NOTES AND SOURCES: Relationships in parentheses are not statistically significant at the .01 level. National Telecommunications and Information Administration (NTIA), Video Program Distribution and Cable Television: Current Policy Issues and Recommendations (U.S. Department of Commerce, June 1988), Chapter 6.

service and more specialized basic services (Black Entertainment Network and Lifetime [see Exhibit 4]).

From the NTIA data, TCI's strategy of exercising monopsony power is overwhelmingly apparent. TCI was less likely to carry eleven of the 15 most popular basic services analyzed by NTIA. Thus, as a dominant cable operator, TCI offers fewer programs to its subscribers, saving on the cost of programming and increasing its profits.

OVER-THE-AIR TELEVISION IS NOT AN EFFECTIVE COMPETITOR FOR CABLE

Over-the-air television has proven to be ineffective as competition for cable.33/ With its limited channel capacity, and the cable strategies of bundling network programming into larger packages, there is simply no way that over-the-air television can be seen as delivering a near enough substitute to effectively check cable's market power.

Over-the-air stations are caught between a rock and a hard place. With limited channel capacity, they cannot compete with the specialized and diverse programming cable can offer. Yet as cable becomes more pervasive, the over-the air networks need to be part of the basic package to preserve their audience.34/ However, once they are on the cable, they are at the mercy of the operators for channel location. They can be easily disadvantaged by bad location.35/ Local stations can be put out of business by

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33/ Chan-Olmsted and Litman, op. cit.; and Ordover and Braunstein, op. cit., p. 561; "Testimony of William B. Finneran, Chairman New York State Commission on Cable Television," in Competitive Issues in the Cable Television Industry, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988.

34/ Chapman, op. cit.

35/ See Competitive Issues in the Cable Television Industry, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary, United States Congress, March 17, 1988, pp. 657-658.

EXHIBIT 4:

PERCENTAGE OF OPERATORS CARRYING PARENT AND RIVAL PROGRAMMING

		AFFILIATES PROBABILITY OF CARRYING PROGRAMMING	
SERVICES		ATC AFFILIATES	VIACOM AFFILIATES
PAY SERVICES			
ATC PROGRAMMING			
PAY SERVICE:	HBO	100	89
	CINEMAX	89	47
BASIC SERVICE:	USA	97	58
	BET	20	21
VIACOM PROGRAMMING			
PAY SERVICE:	SHOWTIME	46	100
	TMC	16	21
BASIC SERVICE:	LIFETIME	82	78

SOURCE: National Telecommunications and Information Administration (NTIA), Video Program Distribution and Cable Television: Current Policy Issues and Recommendations (U.S. Department of Commerce, June 1988), Chapter 6.

a refusal to carry, an issue which is currently hotly debated.36/

Recent survey evidence demonstrates the problem the networks face (see Exhibit 5). Consumers increasingly value the unique aspects of cable programming that cannot be duplicated over-the-air. Consumers overwhelmingly favor a broad array of viewing choices and consider cable better than over-the-air broadcasting for entertainment, sports, cultural programs, educational programs and overall variety. With cable systems carrying the networks plus a highly valued variety of additional, popular programming in their basic tier, it is obvious that over the air cannot effectively compete with cable.

DEMAND ALONE CANNOT EFFECTIVELY RESTRAIN THE CABLE INDUSTRY'S ABUSE OF CONSUMERS

The only disciplining force left in the cable industry is consumer (un)willingness to pay, since supply-side market forces are weak at best. We cannot imagine that Congress would have deregulated the industry if it had been told that the only thing restraining cable prices was going to be the limits of consumer tolerance for price increases without viable economic alternatives. Nor would antitrust authorities ever accept an antitrust defense that said, "there is no competition on the supply side, but we are only charging the limit price on the demand side."37/ Unfortunately, that is essentially what the consumer faces today.

The fact that cable may be somewhat competitive with video rentals and the movies does not alter this basic conclusion. These alternatives are only partial competitors for cable and they are not very economic competitors. The transaction costs of

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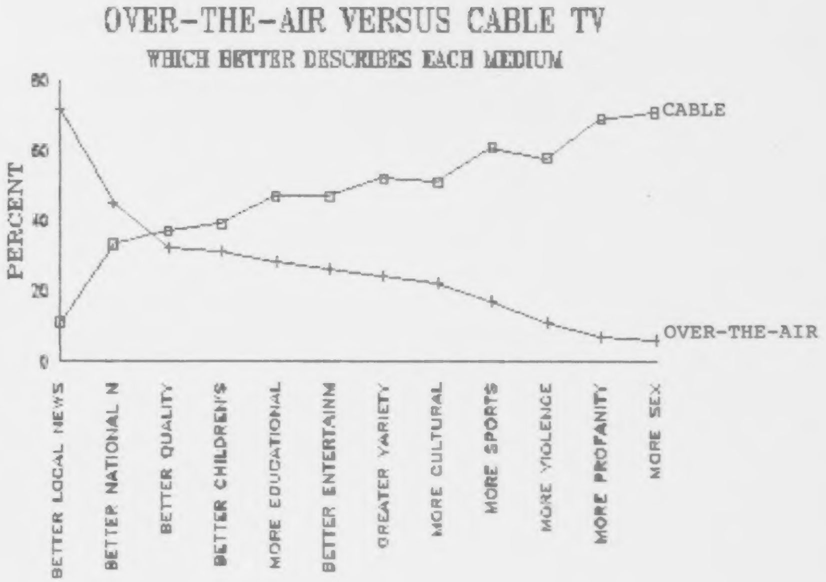
36/ Chapman, op. cit.

37/ For a discussion of the strategy and effects of limit pricing see F. M. Sherer, Industrial Market Structure and Economic Performance (Chicago: Rand McNally, 1980), pp. 232-258.

EXHIBIT 5:



SOURCE: The Roper Organization, *America's Watching The 1989 TIO/Roper Report* (1989), p. 4.

both are much higher.

Therefore, demand-side only competition would leave cable with huge economic rents resulting from its inherent advantage as a distribution medium. These rents would be competed away in a market where head-to-head competition or competition from close substitutes were present. In short, it is supply-side competition that is the key to price discipline in the cable industry and the and the absence of such competition which has allowed the price/cost ratio of monopolistic cable systems to have been driven beyond reasonable levels.

It is important to recognize as well that television viewing habits have been established as a result of 40 years of free, over-the-air television. Basic consumption patterns of information, news, sports, entertainment and culture have been deeply affected by this experience.

Americans watch a significant amount of television, 7 to 9 hours per day.38/ In the past four decades, television has taken the premier role in American life as a source of information and entertainment.

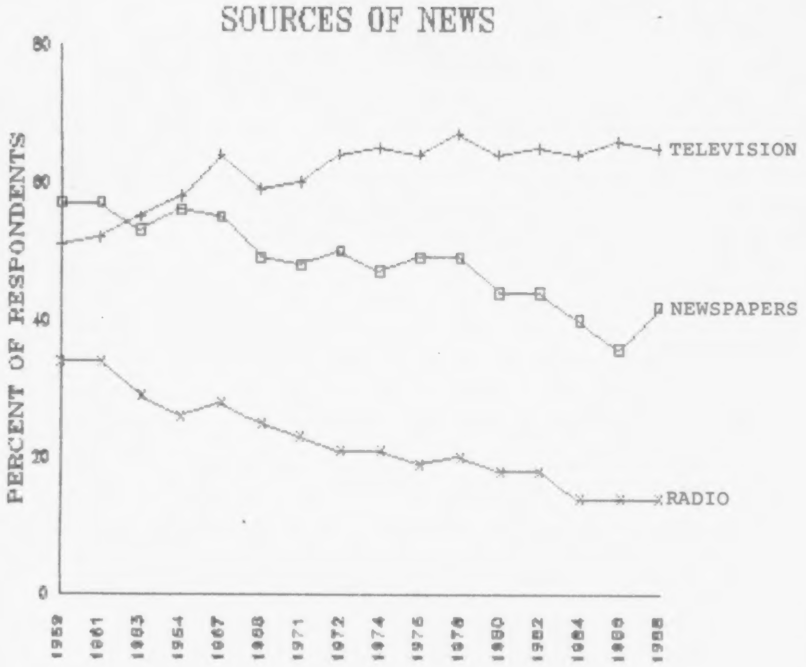
From its infancy after World War II, television grew to represent about 19 percent of every dollar spent by Americans on leisure and entertainment in 1960 and over thirty percent in 1983 (see Exhibit 6).39/ Similarly, by 1960, television was a close second to newspapers as a source of news (51 percent compared to 47 percent) followed by radio (34 percent [see Exhibit 7])40/ By 1988, television (65 percent) had far surpassed newspapers (42 percent) and radio (14 percent).

38/ Consumer Reports, op. cit.

39/ Harold. L. Vogel, Entertainment Industry Economics: A Guide for Financial Analysis (Cambridge: Cambridge University Press, 1986 p. 11.

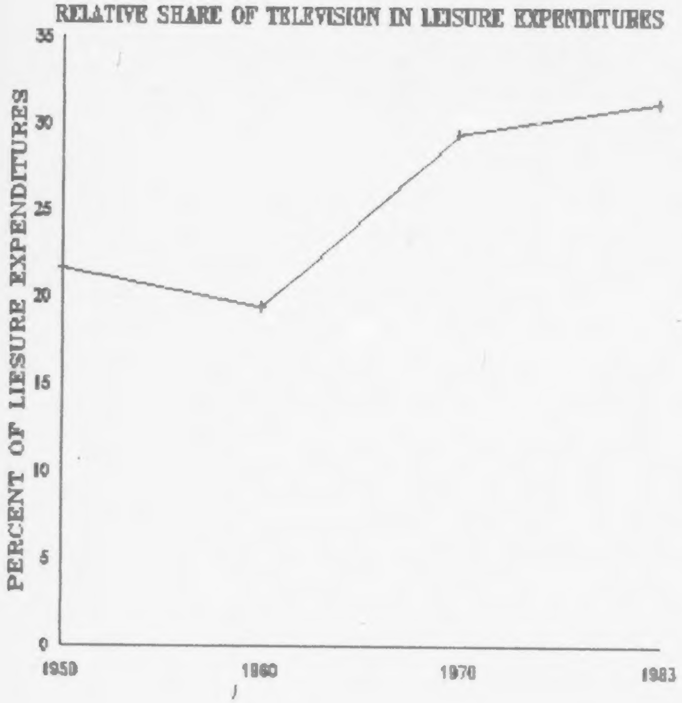
40/ The Roper Center, op. cit., p. 27.

EXHIBIT 6:



SOURCE: The Roper Organization, America's Watching The 1989 TIO/Roper Report (1989), p. 27.

EXHIBIT 7:



SOURCES: Harold. L. Vogel, Entertainment Industry Economics: A Guide for Financial Analysis (Cambridge: Cambridge University Press, 1986, P. 11.

Reflecting these underlying consumption patterns, the elasticity of demand for cable viewing is not great. Studies from the early and mid 1970s estimated the elasticity of demand at around 1.[41] By comparative standards this is quite low.[42] As penetration rates have increased and program offerings have expanded, the elasticity has probably declined.[43]

While there might be some truth to the argument that the public would be better off if it watched less television, achieving that goal by allowing cable systems to ruthlessly exploit those who cannot "kick the habit" is definitely not in the public interest.

The deeply entrenched viewing patterns and strong demand for entertainment, information, news and sports gives the cable industry a great deal of market power. Thus, the weak market disciplining forces on the supply-side are matched by equally weak market disciplining forces on the demand side.

THE CABLE INDUSTRY HAS ASSERTED ITS MARKET POWER BY OVERPRICING SERVICE TO REAP EXCESSIVE PROFITS

As market power has grown the cable companies have increased overall prices, engaged in greater price discrimination, repackaged services to attract new customers, camouflaged rate increases (i.e. capture consumer surplus) and reaped huge monopoly profits. Between 1984 and 1986 basic rates increased 21 percent, while pay rates increased only 5 percent (see Exhibit 8).44/ Since deregulation of rates, basic rates have increased another 36 percent, while pay rates have declined slightly.45/

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[41] S. M. Besen, et al, "Economic Policy Research on Cable Television: Assessing the Costs and Benefits of Cable Deregulation," in Paul MacAvoy (Ed.), Cable Television Deregulation (American Enterprise Institute, 1977).

[42] William M. Landes and Richard A. Posner, "Market Power in Antitrust Cases," Harvard Law Review, 94 (1981), use an elasticity of 1 as low in their hypothetical example.

[43] Three factors may contribute to the decreasing elasticity of demand over time -- the habit of consumption, more programming and greater disposable income

In spite of rising basic rates, subscriptions to basic services increased more rapidly than pay services, in large measure because tiers were reconfigured. Operators needed to make the basic tier more attractive -- adding popular entertainment and sports programming -- to justify substantial rate increases (see Exhibit 9).

It is clear that the pricing/packaging strategy is one intended to transform consumer surplus into producer surplus. Although consumers would be less willing to pay for certain elements of the larger package, they swallow the whole thing since their access to those elements they want the most is tied to those they want less.

There is a formal theory of this extraction of consumer surplus that can be found in the economic and marketing literatures. The following is a recent statement of the principle from the Journal of Marketing.

> Consider, for example, a case in which we have two products or services and can estimate the distributions of reservation prices (the maximum amounts buyers are willing to pay) for each product. By bundling the products together, we essentially create a new product. If the two products are independent in demand, some customers who would only buy one of these products if they were priced individually will now by both products. The

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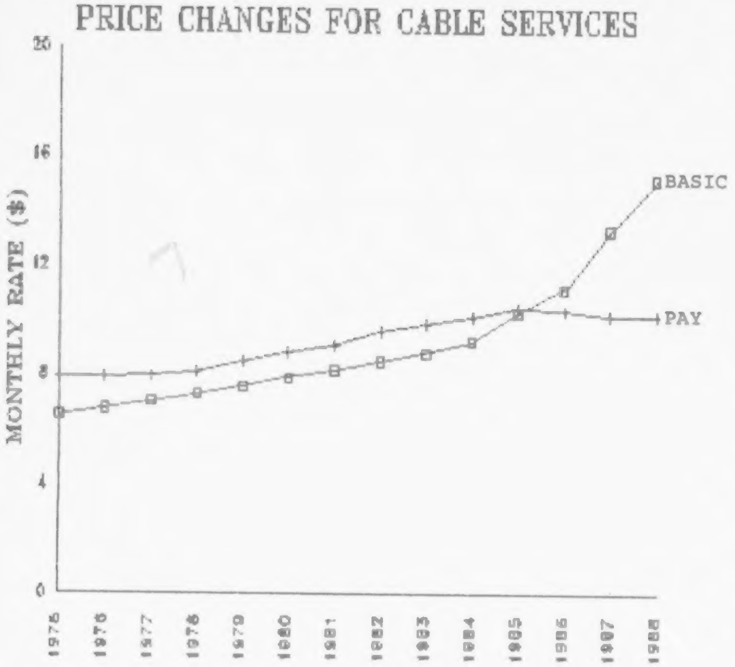
44/ Paul Kagan Associates, Inc., The Pay TV Newsletter:Census Issue, 1988.

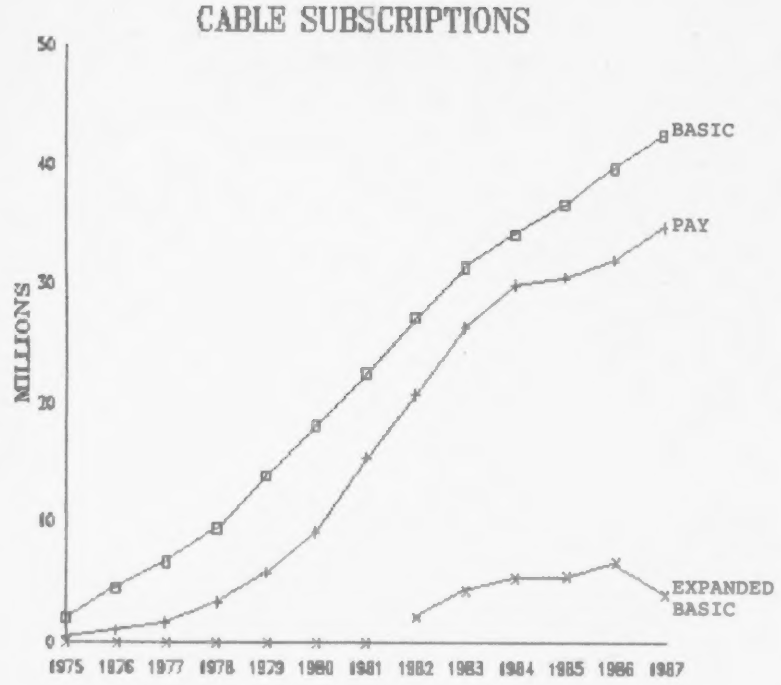
45/ Wall Street Journal, April 7, 1989, reports the basic service increases. Kagan, op. cit., affirm the policy of maintaining pay services at stable rates.

EXHIBIT 8:



NOTES AND SOURCES: Pay service rates are conservatively projected to have remained unchanged in 1988. Paul Kagan Associates, Inc., The Pay TV Newsletter:Census Issue, 1988. Wall Street Journal, April 7, 1989, reports the basic service increases.

EXHIBIT 9:



SOURCE: Paul Kagan Associates, Inc., The Pay TV Newsletter:Census Issue, 1988.

> reason is that the value these customers place on one product is so much higher than its price that the combined value of the two products exceeds the bundled price. In economic terminology, the consumer surplus (the amount by which the individual's reservation price exceeds the actual price paid) from the highly valued product is transferred to the less valued product).46/

There is also graphic evidence of this practice in the cable industry. Pre-deregulation pricing left some consumer surplus in the consumer's pocket. But deregulated pricing strategies have moved aggressively to bundle services and capture consumer surplus.

> If viewers can purchase one channel and watch a second channel for free, they never will pay the market value of the second channel. A more profitable alternative for the pay television operator would be to offer program type A on the first channel and program type B on the second, and then sell both channels as a package. At an appropriate price, consumers will purchase the package. Even if the costs of scrambling were minimal, the package selling strategy would be more profitable than selling each channel individually.
>
> The practice of bundling recognizes that consumers have preferences not only for program types, but also for program variety. For example, some consumers might pay $25 for service A only; $25 for service B only; but $37.50 for a bundle of both A and B. Bundling is like an insurance policy. Whatever occurs, the consumer can watch his or her preferred program.
>
> But package selling may be attractive even aside from its insurance policy attributes. With package selling, the profitability of carrying a program type depends not only on how much revenue it generates on its own, but also how much it

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46/ Joseph P. Guiltinan, "The Price Bundling of Services: A Normative Framework," Journal of Marketing, 51: April (1987), p. 75.

increases the total package's revenues.47/

The margin is higher on basic than on pay, yet it is basic that is being increased and will continue to be. It is acknowledged that in the deregulated era the rebundling of services is constrained only by efforts to keep the price/value ratio below the drop-off point.

> If we go out and sell the value of the product, then we can all stop worrying about pricing... operators concentrate on persuading consumers that cable is more valuable than the rates being charged.48/

This pricing strategy of extracting surplus by bundling premium services with basic is consistent with evidence on consumer preferences and the cable industry's advantages over its competitors. The result is excess profits.

It is difficult to obtain direct data on the profitability of cable operators or programmers because they are frequently subsidiaries of holding companies. However, an analysis of purchase prices for cable systems indicates very large monopoly profits inherent in the industry.49/ Although there is quibbling over methodology, cable systems are clearly selling at several times their reproduction costs.50/ That is, if barriers to entry could be removed and fair access to programming could be ensured competitors could enter and build systems at less than half of what existing systems are selling for.

47/ Cecilia Conrad, "Choosing Cable Programming Services," Cable TV and New Media, 4:9 (1986).

48/ "How to Raise Rates and Survive," Broadcasting, NCTA, 1987.

49/ Shooshan & Jackson Inc., Measuring Cable Market Power: Recent Developments (Washington, D.C., December 1988), summarizes the development of this argument.

50/ Robert M. Pepper, Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies and Institutional Change (Office of Plans and Policy, Federal Communications Commission, November 1988).

The growth in these monopoly profits since deregulation is also clear (see Exhibit 10). In 1983 reproduction costs were estimated to be approximately $600 per subscriber. Sales prices on cable systems were in the range of $900 to $1200. Estimates of today's reproduction costs are in the range of $600 to $1000. Sales prices of cable systems have jumped into the range of $2200 to $3000.

The estimate of reproduction costs of around $600 for both 1983 and early 1989 may seem inconsistent, but they are not. Interest rates are a key component of the cost of capital for intensive projects like cable systems. A decline of about three percent in the cost of borrowing since 1983 would offset the general increase in the cost of building systems.51/

The estimates of sales price compared to reproduction costs suggest that competitive entry would drive rates down dramatically. The monthly cash flow necessary to earn a reasonable profit on such competitive systems would be less than half of what is currently being paid. Savings to consumers would be on the order of $6 billion.

CONCLUSION

CFA believes that Congress must step in to bring cable rates back into line with costs and promote greater competition in the cable industry. Without public limitations on cable rates (i.e. a new definition of effective competition that suits the monopolistic market conditions) and anti-discrimination/common carrier rules for cable operators, diversity of programming will

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51/ Compare the producer price index and the yield on long-terms corporate bonds, Economic Report of the President, February 1989.

EXHIBIT 10:

ESTIMATES OF REPRODUCTION COSTS AND SALES PRICES OF CABLE SYSTEMS

YEAR	REPRODUCTION	SALES PRICE	RATIO OF AVERAGE SALES PRICE TO REPRODUCTION COSTS
1983 (a)	$645	$695-1110	1.5
1986 (b)	$616-1000	$1650-1732	2.1
1988	$600-1000 (c)	$2300-3300 (d)	3.5

SOURCES:

a/ Harold. L. Vogel, *Entertainment Industry Economics: A Guide for Financial Analysis* (Cambridge: Cambridge University Press, 1986, Chapter 7.

b/ Shooshan & Jackson Inc., *Measuring Cable Market Power: Recent Developments* (Washington, D.C., December 1988), summarizes the development of this argument.

c/ Low estimate is (b) above, high estimate is Robert M. Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies and Institutional Change* (Office of Plans and Policy, Federal Communications Commission, November 1988).

d/ See (b) above.

be curtailed and consumers will continue to be overcharged for cable services.[52]

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[52] This solution stresses regulatory intervention to foster competition and restrain rates and does not contemplate lifting the ban on telephone company ownership of cable systems. Telephone company entry into cable would not be pro-competitive at the present time. Unless and until local telephone companies can be prevented from overpricing monopoly basic telephone service to subsidize competitive ventures, consumers stand to lose more than they would gain from telephone company provision of video services (see Comments of the Consumer Federation of America, In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, CC Docket No. 87-266, December 16, 1988). The inevitable remonopolization of video services by an even more potent monopolist, who integrates both telephone and video services, poses an even greater threat to the public interest than the current state of affairs. In the long-term, the need for procompetitive open access rules and restraints on rates would be even greater with a telephone company-based monopoly of video home entertainment services, while, in the short-term, the monumental burden of preventing cross subsidy would be added to a regulatory apparatus that has proven ill-equipped to handle the task.

Senator METZENBAUM. Thank you very much, Mr. Kimmelman.

Mayor Volgy, I have been getting a lot of mail on this subject, maybe hundreds of letters from consumers across the country who are concerned about the increased cable rates. You are chairman of the Communications Committees for the U.S. Conference of Mayors as well as the National League of Cities. What are your colleagues, mayors of other cities throughout the country, saying about the matter of cable rates?

Mr. VOLGY. Mr. Chairman, I would not be here today were they not saying pretty much the same thing that I have indicated in my testimony. They are extremely concerned about their inability to do anything for their consumers, who they feel are very much at the mercy of monopolistic practices. They are telling me that rates have gone up too fast, that they have a crippling effect on a very sizable segment of their community, where, in effect, people have to choose between having access to information and communications versus paying for the rent. Increasingly, it is turning into a greater and greater hardship for their citizens.

What I am hearing from fellow mayors and council members throughout the country is an enormous amount of frustration about this process, a process that they thought was going to be very, very different in 1984 from what it turned out to be. And they are very much worried, Mr. Chairman, about the future, about whether or not the continuation of these kinds of practices will lead down a road where this situation is going to get much, much worse very, very soon.

Senator METZENBAUM. We know the FCC action. We know that there is no competition throughout the country. Nevertheless, the cable industry still takes umbrage when it is referred to as an unregulated monopoly. As a matter of fact, a Wall Street Journal article has dubbed cable "a monopoly."

Do the cities have any recourse as far as keeping the monopoly from being monopolistic? Is it realistic to think that you can give somebody else a franchise?

Mr. VOLGY. Under present law, Mr. Chairman, I do not see how. We do not have an exclusive license or franchise in my city. And as far as I understand, in most cities there are no exclusive licenses. That means, in effect, that any other cable company can come on into the community and wire. But we would request that they wire the entire community.

If we are really talking about competition, what we have to be talking about is the possibility under those circumstances of two wires running to the same house. That virtually never happens anywhere in this country. In no cable company's case would that be really a reality in the future, not in Tucson and virtually nowhere else in medium and large size cities.

Senator METZENBAUM. The cable industry claims that re-regulating cable will bring us back to the bad old days, the early 1980's. They argue that rate regulation will harm consumers by eliminating the cable operator's ability to offer consumers a high volume of diverse quality programming. As a result, they argue rate regulation will make consumers worse off. How do you respond to that?

Mr. VOLGY. Well, Mr. Chairman, if my city is an example, most of the franchising that occurred in most cities was based on a contractual basis that we use to do business all the time. We put out bids, and we chose the best bidder among competing firms, and it was done on a competitive basis.

What I can tell you is that since deregulation, we probably have less diversity of service today than we have had in the past. And if I could have lugged on the plane coming from Tucson the six volumes of books that were given by our initial franchisee, I could now visually demonstrate to you what was promised to us in 1981 when we were franchised, versus actually what is running on our cable system.

The reality of today is a much smaller reality than was promised to us in the pre-noncompetitive days. So I think the issue of greater diversity has not materialized; in fact, there is less diversity right now in terms of these technologies, and also video programming, than there was initially promised to us.

Senator METZENBAUM. Mr. Ramirez, is it my understanding that when your system was sold last year, the seller stressed to prospective buyers the absence of any constraint on the Laredo cable operator's ability to raise prices? Did I understand you to say that?

Mr. RAMIREZ. Yes, sir, that is correct. I quoted the language of the seller and buyer themselves.

Senator METZENBAUM. It is my understanding that the Laredo government uses its public access channels to provide programming that responds to the needs of the substantial number of Spanish-speaking residents in your community. I also know that yours is, as you have indicated, very much of a Spanish-speaking community. That is only available on cable for their entertainment and information.

Are you concerned that affordable access to this programming is at the mercy of an unregulated monopoly?

Mr. RAMIREZ. Yes, sir, absolutely. Let me give you an example of what has happened in Laredo, in fact, in this last sale. I feel that this argument that cable is a good value is an argument that is perpetuated by the cable industry that attempts to justify demand curve pricing. The argument is really an admission that they do have monopoly pricing powers.

In Laredo, for example, the book value of our system at the time of the transfer was approximately $6.5 million. It was, and still is a very profitable system, netting over $1 million a year within our small community. That system was sold for $66 million just last year, more than 10 times book value. If the consumers are to be protected, the value should be more in line with a cost curve pricing than anything else.

These fantastic prices, and the fantastic debt incurred to pay them, crate a very reasonable fear that vital services on cable will become unaffordable to those who need them most. As you can see by the penetration that we have in Laredo of 70 percent, and with the low income that is documented in our population, I do feel that the monopoly power of cable in our community could severely curtail our considerable efforts to bring Spanish-speaking residents into the mainstream by teaching them English through the cable programs; to reach school dropouts with education at home, and for other desperately important public purposes that Congress allowed us to carry out on our franchised cable systems. And so I do feel that, yes, it would have a negative effect in the future.

Senator METZENBAUM. I have some additional questions, but in the interest of fairness, I will turn it over to Senator Simon for 2 minutes.

Senator SIMON. Thank you.

Mayor, when you talked about six volumes, these were assurances that were given to you and then you gave a franchise; is that correct?

Mr. VOLGY. That is correct, Senator.

Senator SIMON. And the city signed some kind of a document. Is that document not being lived up to by the franchisee?

Mr. VOLGY. There were contractual commitments, Senator, and, in fact, some of those contractual commitments have been honored. Some of those contractual commitments have been forgiven. Some of those contractual commitments, we were told by the cable company, could not be honored because the technology was not really there, or that the need was not there, although we would dispute their needs assessment.

So there have been a variety of reasons why the diversity is not there today, but it is far less diversity than what we were promised, sir.

Senator SIMON. And the problem is both diversity and rates; is that correct?

Mr. VOLGY. I believe, Senator, that it is partly diversity, partly rates, partly a problem that there is a big contagion effect here, which is transfers of ownership. If I could just take 30 seconds, sir, and illustrate it in the best way I can, we franchised in 1981. In 1984, our cable company was bought by a new cable company for between $52 and $55 million. I believe 16 months later, they turned around and sold that cable company for $112 million. Sixteen months after that, the new cable company that bought the cable company for $112 million just turned down an offer to purchase it for $155 million. These are transfers of ownership. These do not require expansion of programming or expansion of services. There are folks who are making substantial profits on simply the transfer of ownership.

Every time we have had a transfer of ownership, there has been a very, very significant increase in rates as a result. And it is that captive audience that then pays them for that cost in the transfer of ownership.

Senator SIMON. But your original contract, I assume, dealt both with diversity and rates, and whoever buys has to live up to the contract; is that correct?

Mr. VOLGY. Yes, sir, and the city at times has willingly given up some of that diversity at the request of the cable operator indicating that it needed to cut back on some of its promises because that way they can control rates and not have to deal with problems regarding profits. Yet the cable company afterwards would be sold for enormous profits.

So part of our problem is dealing with this enormous set of intangibles that have developed. In our case, our cable operator is indicating that roughly 45 percent of its assets are intangibles. Now, I do not know, Senator, what that means. I wish somebody would explain that to me.

Senator SIMON. Mr. Ramirez, what he is describing is fairly similar to what your situation is?

Mr. RAMIREZ. Yes, Senator. In this last transfer, a similar situation occurred where the buyer did not feel that it could live up to certain obligations under the franchise that we have in place, and thus offered us approximately $3 million to buy out the clauses under this contractual agreement. We have, in fact, because of our commitment to public access and the fact that it does represent a major role in our community—a window to the world for a lot of people in Laredo—we set aside almost a third of that money to make sure that we had public access. But, yes, it is the same situation.

Prior to this, in October 1987, there was another potential buyer who wanted to buy the system for $46 million. He backed out of buying the Laredo system and went out and bought two other systems, held on to them for a few months, flipped those two systems for a $12 million profit, and went into the savings and loan business. [Laughter.]

So you can understand the situation where we have a poor community, and we are concerned about the basic rates, Senator. We are deeply concerned about the basic rates.

Senator SIMON. Sounds to me like we may be dealing with him in another committee. [Laughter.]

Mr. Kimmelman, you advocate "a little regulation."

Mr. KIMMELMAN. Yes.

Senator SIMON. What do you mean by that?

Mr. KIMMELMAN. Well, I do not think we should go back to 20 years ago, and I do not think we should re-fight all the fights between the cable industry and the cities in the franchising process. But I think the 1984 act went too far. I think the marketplace has developed differently than many people expected. People need cable service much more than was anticipated. Competition has not developed. So I would say a not-too-intrusive approach. The FCC should go back and revisit the effective competition definition, as Senator Metzenbaum has proposed this morning.

I think it is very important to make sure that we are pricing cable service close to its cost. There has been much discussion of the value of cable service. There is no question about the fact that it is valuable, but if the cable company is charging more than double the cost of providing the service, or even higher, would it not be a better value to the American people to get that service closer to its cost and still have the value, keep the rest of the money and put it in their pocket?

If Congress directs the FCC to revisit the issue—and there is some split authority between the local franchising authority and the FCC—I think that we can clean up some of the excessive pricing that has gone on and give people value close to the cost of providing that service.

Senator METZENBAUM. Mr. Kimmelman, I am just going to interject. I know Senator Simon has not finished. But what makes you think that the FCC would respond to directions from the Congress? Since I have been here, I have no recollection that the FCC ever responded, and I think that you are in Never-Never-Land. I just do not think that is realistic. They have not changed the players that much, and I cannot believe that just because Congress says so—I think the way Congress responds is by legislation, which is what I am proposing, not that we go back to the FCC and say, please, now, be good boys and have some brains, where you did not have any before, in setting the definition.

Mr. KIMMELMAN. I am not disagreeing with you, Mr. Chairman. My recollection of the FCC is very similar to yours. I am suggesting that it would take legislation to specifically direct the FCC with some parameters established by Congress as to what effective competition is, so that the FCC gets the message loud and clear.

A definition that focuses on the availability of a comparable package of programming, multichannel programming provided by another cable system, another wire line, or another technology is clearly the only viable competitor to a cable operation. That is what the FCC needs to focus on.

Senator METZENBAUM. Senator Simon, I did not mean to interrupt.

Senator SIMON. I have just one other thought that is not part of this hearing today. But in addition to complaints about rates that we do get from people and some programming complaints, the big complaint I get is people in rural areas who do not have cable. Have you done any thinking about that problem, Mr. Kimmelman?

Mr. KIMMELMAN. Yes, Senator Simon. We have heard many similar complaints. There is evidence, that through some of the vertical integration in the cable industry, the interlocking relationships between cable operators and those who own the programming, the financial affiliations, that there have been efforts to restrict the availability of programming to people in rural areas who would need to get it from an alternative technology like satellite technology.

In many instances, it is not financially viable to lay cable in sparsely populated areas, but out of an interest in maximizing their profits, these integrated cable companies have not been willing to deal as much as they should have, we believe, with the satellite dish industry.

Senator SIMON. Thank you.

Senator METZENBAUM. Thank you, Senator Simon.

Mr. Kimmelman, the question I have, the cable industry concedes that rates have risen since deregulation, but they claim cable is still a good value for consumers. It claims that rate hikes are justified since prices were artificially low prior to deregulation. The industry also points to increased programming and construction expenditures since deregulation. In short, the cable industry claims that the rate increases have been cost-justified and that deregulation has been good for consumers.

Would you agree with that?

Mr. KIMMELMAN. No, Mr. Chairman, I would not. I have seen no evidence that the rate increases are cost-justified. It is interesting. We deal with a lot of industries that function in competitive marketplaces, and they talk about the need to cut costs, be more efficient, to bring down prices so they can earn a profit. It is very ironic to hear the cable industry talking about value. It is traditionally the terminology that monopolists talk about because it is about the only justification the public may possibly accept for price increases, where there is no viable competitor.

As far as we can tell, the cable systems are much more valuable in terms of market prices than the costs of providing the cable service, and that excess is being pocketed by the cable operators. And it is not redounding to the benefit of consumers in the form of rate reductions, which we believe they deserve.

Now, yes, in some instances there is more programming. But at the same time, we see example after example of cable operators favoring their programming affiliates and not carrying the programming of unaffiliated programming interests. Whether this benefits the public is very, very difficult to determine, but it is an ominous sign of self-dealing within the industry and not providing consumers the maximum choice of programming alternatives which we believe they should have.

Senator **Metzenbaum**. Mayor Volgy, you were a key negotiator for the cities during the negotiations on the 1984 Cable Act. The cable industry claims that the FCC effective competition definition is right in line with what Congress sought to do in the Cable Act. Do you agree with that?

Mr. **Volgy**. Mr. Chairman, I guess the members are better judges of the intent than I would be. All I can indicate to you, sir, is that the position of the cities was that we were willing to live with one of two worlds. We are willing to live with the world of regulation, or we are willing to live with the world of competition. We are not willing to live with either being missing in this picture.

And as we envisioned or as we interpreted Senate Bill 66, and what we thought was the intent of the Congress, was that it would allow for a full competitive environment in which consumers could choose from competing, roughly equivalent services, or the cities would regulate. I think that was our intent. I surely think that that was the intent of the Congress. Surely I cannot believe that it was either the intent of the cities or of the Congress to go to a situation where there would be neither regulation nor effective competition.

Senator **Metzenbaum**. Thank you very much.

I just want to say how pleased I am to see the newest member of the Antitrust committee with us here this morning. Senator Kohl, we are happy to have you with us and look forward to working with you. If you have any questions for this panel, please feel free to proceed, or if you have an opening statement, please feel free.

Senator **Kohl**. I have an opening statement. I would like to submit it.

Senator **Metzenbaum**. Without objection, the opening statement will be included in the record, immediately after Senator DeConcini's opening statement. My understanding, Senator Simon, is you did not have an opening statement.

Senator **Simon**. I do not have an opening statement.

Senator **Kohl**. I would like to ask this question of any member of the panel. Customers may have choices within their cable system, but most cannot switch to a competing service because few exist in most communities. How can we encourage competing services at the local level?

Mr. Volgy. Senator, if I may respond, I think that there are two areas here where competition can increase, and my colleague, Mr. Kimmelman, earlier indicated one very important part of it, which is the whole problem of vertical integration and the extent to which there is a free allowance for programming to be accessible to other competitors. That is one issue.

I think the other issue is the recognition that, in the long run, there are two wires running to homes in most cities today. One is the cable wire; the other is a telephone wire. By prohibiting the use of that telephone wire for this kind of competition, it virtually eliminates the single major competitor. And if the cable companies are really truly interested in true competition, I have a pretty good idea that the telephone companies can provide very ample competition to the cable industry. That is another alternative.

Frankly, the National League of Cities and the U.S. Conference of Mayors have had extensive discussions with the United States Telephone Association in terms of potential ground rules under which that could occur. Because I think that it is not necessarily an automatic or a given that that would also be a perfect environment. But they have been very responsive in terms of appropriate ground rule by which telco's could enter into a competitive environment. That is another alternative, sir.

Mr. Kimmelman. Senator Kohl, if I could add to that, while I agree in part with what Mayor Volgy says, we have grave concerns about the telephone companies entering the cable marketplace. While it is another wire, it is a wire that has a history of discriminatory practices, in an industry where we have a long history that led to the breakup of AT&T that involved efforts to overprice basic phone service. At least at this time, until there is some clarification of how regulation could deal with these problems, of how we would not have a remonopolization with ultimately one wire, we think it would be very dangerous to turn to the phone companies.

I think the simple answer is that we ought to have nondiscriminatory access to programming for alternative technologies to see if there is some viable competition in the cable market from entities that cannot overprice other services in order to enter the video business. Wireless cable, satellite dish, at least offer some possibility of that right now. And I think the most important thing is to make sure that they have a fair chance to compete in the cable marketplace.

Senator Kohl. Are you saying that it is not necessary for us to reinstitute regulation? Are you suggesting that that must be done? Any of the three of you.

Mr. Kimmelman. Senator Kohl, I would suggest that it must be done, at least now, until we see if there is a viable competitor that can emerge in this marketplace. Again, I think we need to find the least intrusive method of making sure that cable operators are charging rates that are close to their costs and not in excess of that. And I think it is something that the FCC needs to be required to go back to the drawing board with clear directions from Congress to develop a limited system of regulation.

Senator Kohl. Do all three of you feel the same way—that we need to reregulate?

Mr. Ramirez. Absolutely.

Mr. **Volgy**. Yes, Senator. I think the last thing the local elected officials want to do is regulate cable rates. But until you have a truly competitive environment, I think it really becomes imperative for the consumers that you do not have an unregulated monopoly.

Senator **Kohl**. I have noticed a dramatic increase in the prices that buyers are paying for cable systems which have sold recently for as much as $2,700 a subscriber. That is nearly triple the average of $946 in 1984 before deregulation. My question is: As a former businessman myself, a nearly 300 percent profit in 3 years seems extraordinary in a competitive market. Are recent rate increases simply the result of cable owners recouping their costs in a monopoly environment? Do you think that is what these new prices are indicative of?

Mr. **Volgy**. I would not argue that that is the only reason, but I would say in terms of our experience, Senator, that every time there has been a transfer of ownership with sizable profits from that transfer of ownership, we had very, very significant rate increases. And I am very much concerned what is going to happen in terms of the next transfer of ownership in my community, because I am willing to bet you that it is going to be followed by, again, a sizable rate increase.

I do not know how else the cable company that buys the system is going to make it up.

Senator **Kohl**. You are saying they pay extraordinarily high prices, and then they simply make it up by increasing their charges?

Mr. **Volgy**. Well, Senator, you indicated that you as a business person see these as very high prices. My cable company was bought for $52 to $55 million in 1984; 18 months later, it was sold for $112 million, sir. Eighteen months later, there was an offer to that cable company for another purchase at $155 million. I do not know who is going to make that up except the consumer in the long run, and us forgiving contractual commitments to the cable company.

Mr. **Ramirez**. If I may add, the situation, Senator, in Laredo is similar to what is happening in Tucson, only that it is more acute inasmuch as it is a geographically isolated area. We do have a high number of low-income families within our community, and we have an extraordinarily high penetration rate, 70 percent. In fact, when this whole binge on transfers began, I mentioned earlier that there was an offer for the system in October of 1987 of $46 million. Through negotiations and the city's public statements the potential buyer realized that the city of Laredo was concerned about issues it is entitled to be concerned about under the Cable Act. Later the potential buyer backed out of the deal. Shortly thereafter, a new buyer purchased the same system for $66 million. And our system has a book value of $6.5 million.

The basic service is on the low end of the tier if you compare the large communities throughout the State of Texas. We have 12 channels on our basic service, and three of them are public access. So that is why we are so concerned about developing our public access programming for educational purposes and other things. But we feel that someone down the road may come in and make an offer for 88 or 90 million dollars. Our franchise expires in 9 years.

Where will the new owner get the $66 million to recover what it has spent, other than from the people of Laredo and another, even more inflated sale?

Senator **Kohl**. Do you have some indication? Can anybody tell us about what the rate increases have been in your community over the last 3 or 4 years?

Mr. **Ramirez**. Yes, sir. In Laredo, after deregulation, we have gone up from $6.60 to right now what is being proposed—we have gotten word that the new buyer is already talking about—a $2.00 increase to 13.50. That is a hefty——

Senator **Kohl**. A proposal now for 13.50.

Mr. **Ramirez**. 13.50.

Senator **Kohl**. In how many years was that?

Mr. **Ramirez**. That is since 1984, since the deregulation.

Senator **Kohl**. In 5 years?

Mr. **Ramirez**. Yes, sir. And the thing is——

Senator **Kohl**. For the same service?

Mr. **Ramirez**. Same service, yes, sir. In fact, we have had to negotiate several items out of our franchise for up-front money because they went right up front and said, "We cannot commit to doing those things under the franchise." And with that money, we have tried to secure what we can for public access and protect our rate payers.

Senator **Kohl**. What about the other two cities? Do you have any indication in the last 5 years what your prices have done in your community?

Mr. **Volgy**. Senator, since we franchised, our rates have only gone up 70 percent in 6 years. But that is, in part, as a result of us having voluntarily surrendered $30 million worth of contractual commitments that the cable company was obligated to perform according to our contract. So we gave up $30 million plus, of services to allow for only a 70 percent increase in rates.

Senator **Kohl**. Is that for the same service? They are providing the customers the same service?

Mr. **Volgy**. Well, they are providing customers less service than what they contracted for originally by the tune of at least $30 million worth of services.

Senator **Kohl**. If the cable operator were sitting, would he agree with the 70 percent? Is that statistical and noncontroversial?

Mr. **Volgy**. Actually, if the cable operator were sitting here today, I would argue that it is more in the neighborhood of $45 to $50 million worth of service, because there are a whole series of services that have not yet been performed that we have a hard time labeling in terms of dollars and cents.

Mr. **Kimmelman**. Senator, it is controversial. The cable industry has repackaged their services on a nationwide basis. We have tried to canvass what they have done with rates. And they clearly are up substantially beyond inflation for basic rates. Now, they are offering more things in the basic package, but it is often unclear whether it is what the consumer really wants, whether they would like a portion of that package which they now cannot get, or whether they just would like the whole thing.

There is no question about the fact that the rates have gone up significantly beyond inflation and beyond what they did historically under regulation. But what is most important to remember here is you do not have to double and triple them every few years to earn a profit in the cable industry. What we found is this is no longer a fledgling, infant industry. This is a mature industry. The cable is there. With interest rates down in the last few years, with subscribership increasing, we believe the costs are actually declining for providing cable service.

The cable industry is to be commended for offering something very valuable to the American people, something people want. But the real issue is, with the going price of cable systems, are people being dramatically overcharged for the value they are getting. And we believe they are.

In a competitive marketplace, the best data we can find indicate that the price of cable service would not be more than half of what it is today to get that same value. Now, that would be a much better deal for the American people.

Senator KOHL. One other question. Mr. Kimmelman, are buyouts driving up some of the rate increases?

Mr. KIMMELMAN. I am sure there is a problem there, and we have been looking at what we view as merger mania in this industry and many others. But I am not sure that is the fundamental problem. Because if you can sell a cable system for the amount of money they are going for today, that means the current operator can squeeze out that amount of revenue himself; that within the rate structure, within the ability to price without regulation, the ability to choose the programming that the cable operator has the power to do, there is that much excess money on the table in a cable operation. And whether it is in the sales price to a new entity or whether it is remaining in the system, there is a lot of money on the table.

So there is a problem with buyouts and mergers here that camouflages all of what is going on in terms of the monopoly practices of this industry. But the fundamental problem is that the costs are much lower than the amount of money that this industry can extract from the consuming public without a competitive alternative.

Mr. RAMIREZ. Senator, if I may?

Senator KOHL. Yes, sir.

Mr. RAMIREZ. Just to expand on that a little, I have got something here that I would like to read to you, and this is from the prospectus of the last seller and also was used by the buyer in preparing their financing papers to get the purchase financed by lenders.

It says, "The Laredo System has many characteristics of a 'classic' cable system. 'Classic' cable systems are typified by a scarcity of over-the-air broadcast channels otherwise available to potential subscribers in the service area and a perception that cable is a necessity rather than a luxury. In addition, the Laredo system has maintained a stable subscriber base despite a relatively depressed economy, and three separate rate increases implemented over the past 2 years."

That is what they were using to buy and sell the system, in essence saying that we are a captive market, that they control what is going on in Laredo, and we are concerned about that.

Senator KOHL. When does your franchise come up for renewal?

Mr. **Ramirez**. We just extended it another year. It is 1992 when it expires.

Senator **Kohl**. That is when you can do what?

Mr. **Ramirez**. We can go out and put it out for bids again—excuse me, 1998 and an extension with 5 years. I was just corrected.

Senator **Kohl**. 1998?

Mr. **Ramirez**. Is when it expires, yes, sir. Plus an extension of 5 years which was negotiated in this last transfer to help see if we could keep these rates down, because there is no guarantee. The biggest element that we were unable to get from the buyer was that they were not going to regulate the rates in any way, that they were going to raise as they saw fit, period.

Senator **Kohl**. They own the franchise until 1998?

Mr. **Ramirez**. Plus another five that was negotiated into the transfer agreements.

Senator **Kohl**. 2003.

Mr. **Ramirez**. Yes.

Senator **Kohl**. Mayor Volgy?

Mr. **Volgy**. Ours, Senator, expires in 1996. We have not had any request for an extension of the franchise, although, according to the provisions of the bill, whether or not there are these transfers of ownership at very high costs and the fallout on consumers is not something we can consider in looking at other potential franchisees for the system.

Senator **Kohl**. Are you saying that when the franchise expiration date comes, your options are limited?

Mr. **Volgy**. Yes, sir. Our options are highly limited. And, certainly, they cannot be exercised on the basis of simply rates because the new cable company has a real profit problem because they bought the system for too much.

Senator **Metzenbaum**. Could a new company put in new wires, assuming that they could not buy the old system? Is that practical?

Mr. **Volgy**. I would welcome a new company to come in and compete along those terms, Mr. Chairman. I do not think I will find a new company to come on in and double-wire homes in the community.

Senator **Metzenbaum**. No, but I meant along the lines of Senator Kohl's questions. Assuming you came to a deadlock and you could not renew the contract on suitable terms, and the other company just said, well, that is as far as we are going and we are going to be adamant. What I am asking is: Could a new company come in and rewire at far less money than the cost they are paying now to buy the whole system?

Mr. **Volgy**. I am not an economist, Mr. Chairman, and I am guessing at how much it would cost to wire our entire community. But if, in fact, somebody has just offered $155 million for our cable system, I would guess that the cost of wiring our entire city cannot be more today than about $55 million.

Senator **Metzenbaum**. I would guess that it would be far lower than the prices that are being paid.

Senator Kohl, are you done?

Mr. **Kimmelman**. I wanted to add, Mr. Chairman, it is not the issue of the cost of wiring. It does not do you a lot of good to have that wire there if you cannot get the programming that will attract subscribers. With the increasing vertical integration in the industry, the affiliation between the current cable programmers and current cable operators, there is a great fear that it would be difficult to attract the programming to bring value to subscribers to where they would opt for that wire. It may be cheaper, but if it does not offer you the services, if it does not offer you the programs you want to watch, it is not worth a lot.

Senator METZENBAUM. We will get into that more with our next witnesses, I am sure.

I am very happy to have the ranking member of the subcommittee—excuse me, Senator Kohl.

Senator KOHL. No more questions, Senator Metzenbaum. I am delighted to be a member of your panel.

Senator METZENBAUM. Thank you. We are happy to have you here.

The ranking member of this committee has joined us. We are very happy to have him. Senator Strom Thurmond.

Senator THURMOND. Thank you very much, Mr. Chairman. I have three committees going on, and I have to divide my time among the three.

I ask unanimous consent that my statement be placed in the record following that of the chairman.

Senator METZENBAUM. Without objection, the statement of the ranking member will be included in the record immediately after my opening statement.

Senator THURMOND. Mr. Chairman, I am open-minded on this subject. I just want to hear the witnesses. I have no particular questions yet.

Senator METZENBAUM. Thank you very much. We are happy to have you participate with us.

Gentlemen, we very much appreciate your participation. One more question. Mr. Kimmelman, does the Consumer Federation of America support the chairman's legislation?

Mr. KIMMELMAN. Yes, we do, Mr. Chairman. We are very interested in seeing some constraints put on the rates for cable service and making sure that any forms of discrimination that are impeding competition in programming or developing competitive cable systems in local markets are eliminated so the consumers get the best diversity of programming that the marketplace can provide.

Senator METZENBAUM. Mr. Volgy, has the Conference of Mayors and the League of Cities taken a position with respect to the legislation I am introducing?

Mr. VOLGY. Neither the League nor the Conference of Mayors have taken an explicit position with respect to the legislation you are producing. However, in terms of the policies that govern both National League of Cities and the Conference of Mayors, I think the legislation you are suggesting is absolutely consistent with both of those policies.

Senator METZENBAUM. It would be helpful to us if you could get formal action on that subject, and I appreciate working with you on it.

Mr. VOLGY. Yes, sir.

Senator **Metzenbaum**. Senator Simon, I think you had another question.

Senator **Simon**. Unfortunately, I am going to have to get to another committee meeting. I hope to get back here. It was not a question, but I just want to comment and agree with Mr. Kimmelman on the telephone company option. I think there are some problems today, but we could create a monster on our hands if we moved in that other direction. I just think that is one direction we should not go.

Senator **Metzenbaum**. I want to respond to the Senator from Illinois. I think I am in accord with him as to limitations with respect to the original AT&T system. I am not so sure that our efforts to break up the company worked out to the public's interest, but that is yesterday's news. And I recognize the limitations under the court order as far as the Bell System getting into this area.

I do think that those who are presently in it have to recognize that there is a realistic possibility that Congress might be forced to turn to absent our ability to deal with this problem effectively. I would hope we would not have to turn in that direction, and I would hope that the industry would see fit to cooperate in such a way that we can provide protection for the consumer, while recognizing their legitimate economic interests.

Thank you very much, gentlemen.

Our next panel consists of Gerald M. Levin, vice chairman of Time, Inc., of New York, and James P. Mooney, president of the National Cable Television Association.

Mr. Levin, do you want to go first?

STATEMENT OF GERALD M. LEVIN, VICE CHAIRMAN, TIME, INC., NEW YORK, NY, AND JAMES P. MOONEY, PRESIDENT AND CEO, NATIONAL CABLE TELEVISION ASSOCIATION, WASHINGTON, DC

Mr. **Levin**. Good morning, Mr. Chairman. I am Jerry Levin, and I am pleased to be here today to discuss our cable business and the proposed merger of Time, Incorporated and Warner Communications with you and members of the subcommittee.

I know the subcommittee is interested in the merger, and I am prepared to answer any questions that you may have about it. even though the Justice Department found that the merger complied with the antitrust laws.

In the past 4 years, while congressional concerns about American competitiveness have escalated, foreign corporations have spent over $100 billion to acquire a wide range of U.S. businesses, including first amendment-sensitive media and entertainment companies. The responsibility to respond to this challenge lies squarely on the shoulders of American industry. Our merger creates a company prepared to accept this challenge as we break new ground in the complex and difficult global marketplace of the 21st century.

In 1975, I testified before this Subcommittee on a fundamental new concept—pay television. It was then and remains today a provocative idea, challenging the dominant influence that three national broadcast networks continue to exercise over television in this country. Compare the program choices consumers had in the early 1970's with where we are today. There are now over 60 satellite program services. It is no accident that this diversity coincided with the development of the cable industry.

Mr. Chairman, you have raised questions about the vertical integration that has made this programming possible. We believe it is appropriate to focus on what vertical integration has meant for the consumer. Quite simply, it has meant more and better programming. The launch of high quality national program services is a very expensive and risky proposition. Even where such services are ultimately successful, it takes years to recoup the initial investment and startup losses. Vertical integration has been the catalyst that allowed companies like my own to create Home Box Office and Cinemax, Viacom to start Showtime, Warner Communications to create The Movie Channel, Nickelodeon and MTV, and the cable industry to initiate, fund, and carry C–SPAN.

The state of television today is more positive than it has ever been, yet we believe that television can do more to educate and inform consumers. Television technology can be expanded to accommodate new services and more speakers. Making these visions a reality, however, will take an enormous investment of resources from private industry. It will also require a long-term strategic approach, as reflected in the Time-Warner merger. Fiber optics and high-definition television are key areas where the cable industry continues to exercise pioneering leadership. As with satellites in 1975, we are prepared to take that step and spend the resources necessary to realize the vast potential of television.

I know that some have proposed sweeping changes in the structure of the cable industry under the assumption that cable systems are unregulated monopolies. I strongly disagree with that assumption. Cable systems are neither unregulated nor monopolies. Although the Cable Act removed rate regulation in cases where effective competition exists, cities retain significant regulatory authority over cable. Most important is the right to deny renewal of the franchise. Cities can also require cable operators to provide extensive public and governmental access. The Cable Act also established Federal regulations for subscriber privacy, consumer protection, and EEO. Cable's regulatory structure is far more extensive than any of its competitors.

Nor is cable a monopoly. Cable faces significant competition, most importantly from a pervasive and well-established broadcast industry. The three networks still account for nearly 70 percent of all national viewing during prime time, and independent television growth has been explosive in this decade. Cable competes head on with the videocassette machine. The VCR is the fastest growing consumer electronics device ever and is now in over 60 percent of all homes.

While certain technologies such as STV and early MDS have not proved successful, others like MMDS and home dishes have arisen to assert a competitive presence. Last year, HBO and other programmers signed agreements with local REA coops to distribute their services to dish owners.

Mr. Chairman, I would like to close by making a few remarks about the distribution of HBO. HBO has used virtually every available competitive technology since it began in 1972. Recently, HBO has been approached by a small number of multichannel MDS operators seeking distribution. My testimony includes a detailed history of the technical and financial problems with this technology. Given this history, HBO believes that it is prudent to proceed carefully. That is why HBO has entered into a number of agreements to test MMDS. Microband, the largest distributor, is delivering HBO in New York, here in Washington, and in Detroit.

Last, I am very pleased to report that HBO has reached an agreement with Jim Theroux to sell HBO in Metroten's MDS package in Cleveland. You raised this issue with HBO last year, and I believe we have been responsive.

Again, thank you for the opportunity to discuss cable and the Time-Warner merger.

[The prepared statement of Mr. Levin follows:]

TESTIMONY OF

GERALD M. LEVIN

VICE CHAIRMAN, TIME INC.

Before the Subcommittee on Antitrust,
Monopolies & Business Rights

Committee on the Judiciary

United States Senate

April 12, 1989

Good morning Mr. Chairman and members of the Subcommittee. My name is Gerald Levin and I am Vice Chairman of Time Inc. I am pleased to be here today to discuss the challenges of our cable business and, because it is a subject of interest in Congress, the proposed merger of Time Inc. and Warner Communications Inc. We recognize the legitimate role Congress has played for 60 years in overseeing the extraordinary evolution of television. I welcome the opportunity to share with you our goals and visions for the future.

Mr. Chairman, in 1975 I testified before this very Subcommittee on a fundamental new concept -- pay television. It was a provocative idea to challenge the "iron laws" governing advertiser-supported network television and introduce truly alternative programming without commercial interruption and without editing to fit artificial time slots. Consumer response to pay television subsequently became the engine which drove the advance of cable, which, of course, is the major challenge to the dominant influence the three national broadcast networks exercise over television in this country.

HBO began on November 8, 1972, with 350 subscribers in Wilkes-Barre, Pennsylvania. Appearing on HBO that night to introduce a somewhat dated but prophetically entitled movie "Sometimes A Great Notion," I had high hopes for a business that was predicated upon the goal of giving consumers choice, diversity and a greater degree of control over their televison viewing. In its first three years, HBO grew slowly, hampered by the technological limits of terrestrial distribution and the difficult task of building name recognition for a new service. By 1975, HBO was nearing the financial break-even point, but its future prospects seemed limited.

At this point, we turned to satellite technology, which was then used mainly by NASA and the military. We believed it could provide a system for people everywhere to participate in a communications revolution, and that HBO could play a pioneering role in that vision. Satellite distribution had the potential to expand the programming and reach of HBO; however, the financial risk was enormous. Time Inc. deferred modest profitability and accepted that risk in 1975, launching the first daily satellite television feed. That decision helped propel us into a new age of television and ultimately made possible CNN, C-SPAN, The Disney Channel, Black Entertainment Television, ESPN, the Arts & Entertainment Network and over 50 other national program services. It was also the forerunner of the wide use of satellites by PBS and other broadcasters.

Satellite television has been one of the truly significant technological achievements of American business over the last 15 years. The development and use of satellite television technology is one area in which U.S. companies have not had to take a back seat to foreign interests.

Time Inc. has not been the only innovator and risk-taker in the television business. Warner Communications pioneered the use of interactive television and pay-per-view with its QUBE service, thereby opening up another frontier in the use of communications technology. Ted Turner, with his charismatic entrepreneurial genius, took an idea called the "Superstation" and a dream called CNN and turned them into household names.

Our colleagues in the broadcast industry have over the years made enormous contributions as well. The networks, which produced stalwarts like Edward R. Murrow, recently demonstrated they can still produce insightful, original news formats like "Nightline" and distribute appealing entertainment programs like "Lonesome Dove." Active, risk-taking industries also devote resources to research and development. RCA founded Sarnoff Laboratories (now a part of SRI International), a distinguished technology center of the broadcast industry. The cable industry recently established its own R & D center, Cable Labs. Corporate ventures between broadcast and cable are also part of this important history. Fox Television recently contracted to carry cable programming on its new broadcast network. That decision, recognizing the synergies between the cable and broadcast industries, will expand consumer access to a broad array of program services.

In the 1930s, Congress established a lofty goal for television -- to provide a diverse range of entertainment and information programming for all Americans. In the following 50 years, we only scratched the surface of television's potential. In the last 10 years, however, program diversity has expanded even beyond our dreams. Congress' goal is now the norm. There is more diverse and higher quality television programming available today than at any point in the history of the medium. It is no accident that this diversity coincided with the development of the cable industry.

Mr. Chairman, you have raised questions about the vertical integration that has made this wealth of programming possible. We are confident that the level of vertical integration in the cable industry does not violate the antitrust laws. Regarding the merger of Time Inc. and Warner Communications, we are pleased that the extensive review which the Justice Department completed last week, and with which we cooperated fully, has resulted in a determination that there is no basis under the antitrust laws to oppose the merger.

From a public policy standpoint, we believe it is appropriate to focus on what vertical integration has meant for the consumer. Quite simply, it has meant more and better programming. Vertical integration created the economic underpinning that allowed companies like Time Inc., Warner, Viacom and others to take the enormous risks associated with the development, launch and distribution of national satellite program services.

Consider the program choices consumers had in the early 1970s before the development of the current cable industry -- the three networks, PBS and a few independent broadcast signals. Broadcasters remain a potent force in American television programming, but today there are over 60 satellite program services available, including specialty channels devoted entirely to sports, children's programming, news, minority perspectives, the arts and Congress. In addition, the VCR makes consumers' program choices almost limitless.

The following chart compares the program services available to consumers in the early 1970s with their choices today:

CONSUMER PROGRAM CHOICES

1972	1989
ABC	ABC
CBS	CBS
NBC	NBC
PBS	PBS
Local Independent TV Stations	Local Independent TV Stations
	Basic Satellite Program Services: Arts & Entertainment Television, Black Entertainment Television, Cable News Network, C-SPAN, C-SPAN II, WTBS, Country Music Television, The Discovery Channel, ESPN, Home Shopping Network, The Learning Channel, MTV, Nickelodeon, USA Network, The Weather Channel, ACTS Satellite Network, American Movie Classics, Cable Value Network, CBN Family Channel, Eternal Word Television Network, The Fashion Channel, Financial News Network, Headline News, The Inspirational Network, International Television Network, Lifetime, Movietime, The Nashville Network, Prevue Guide, QVC Network, Shop Television Network, Silent Network, TNT, The Travel Channel, Trinity Broadcasting Network, Univision, VH-1, Vision Interfaith Satellite Network, WGN-TV, WWOR-TV, WPIX-TV
	Pay Satellite Program Services: HBO, Cinemax, The Disney Channel, Playboy Channel, Regional Sports Networks, The Movie Channel, Showtime, Bravo
	Pay-Per-View: first-run feature films and special events; Viewers Choice I, Viewers Choice II, Request TV I, Request TV II; Cable Video Store

Vertically integrated companies like Time Inc. created HBO and Cinemax which today have over 23 million customers; Viacom started Showtime; Warner Communications created (and since sold) The Movie Channel, Nickelodeon and MTV; the cable industry created C-SPAN in 1978 and has funded and carried it ever since. Cable operators also provided an infusion of capital necessary to rescue Turner Broadcasting, a financially-strapped company with services like CNN, and funded new programming on services like Black Entertainment Television and The Discovery Channel.

Creation of high-quality national program services is an enormously expensive and risky proposition. Even where such services are ultimately successful, it takes years to recoup the initial investment and the losses that are sustained in the early years.

Last year the National Telecommunications and Information Administration (NTIA) conducted an extensive study of the cable industry and carefully analyzed the state of vertical integration and its effect on consumers. NTIA concluded that the levels of vertical integration in the industry were not cause for alarm. More important, it argued persuasively that vertical integration has produced very significant benefits for consumers. NTIA explained the pro-consumer advantages of vertical integration as follows:

> Vertical integration can also expand the supply of cable programming, thus expanding the diversity of viewing choices for subscribers. Starting a cable programming service is an expensive, risky proposition. By underwriting some of the costs of a new program service, a cable operator can spread some of those risks among several firms, thereby increasing the probability that the service will make it to the marketplace.

The Subcommittee should also know that it was the cable industry that took the risks and put its nerve and money on the line to develop the program services consumers today take for granted. Neither broadcasters, the program production community, nor any other industry stepped up to the plate even though they had every opportunity to do so.

There is another point I would like to make here. Time Inc. and the cable industry have created these program services with a very deep understanding of our obligation to operate in the public interest. For example, we, and others like The Disney Channel and Nickelodeon, have produced innovative high-quality children's programming without being forced to do so by government regulation. HBO has won scores of awards over the years for its outstanding children's programs.

Similarly, the cable industry has produced science and public affairs programming at a time when the broadcasters are turning away from such programs. C-SPAN is perhaps the best, but not the only example. We are very proud of the fact that the cable industry created and has continuously funded and carried C-SPAN. Former House Speaker Tip O'Neill recently expressed the view that C-SPAN has "done the most to bring the message of representative government to the people of the United States" and "stands right up there with all the actions of extending democracy in our great land." In this regard, Congress deserves congratulations for recognizing its obligation to permit the use of cable television to bring our democratic system of government into the living rooms of all Americans. We agree with Speaker O'Neill that this relationship between Congress and the cable industry may be recorded in history as a catalytic event in increasing for all Americans the understanding of how our democracy works.

There is no persuasive evidence that vertical integration has in any way dampened competition. In its Report, NTIA analyzed whether vertically integrated cable companies would discriminate against program services in which they had no ownership interest by refusing carriage of those services. NTIA concluded that "there is scant support for the notion that vertical integration into pay programming by MSOs has led them to discriminate against unaffiliated services, thereby reducing the diversity of pay services to their subscribers."

The record of American Television and Communications Corp. (ATC), Time Inc.'s 82 percent-owned cable MSO, supports this conclusion. NTIA found that ATC's carriage of non-owned services was about the same as the cable industry's carriage of those services. The number of services in which ATC or Time Inc. has an equity interest is very small compared to the number of available channels on most systems. The following ATC chart demonstrates very substantial carriage of services in which ATC has no equity interest.

ATC Distribution of Non-Owned Programming -- March 28, 1989

Basic Services	Total Subs
A&E (ABC, NBC, HEARST)	3.8 million
AMC (NBC, CABLEVISION)	1.5 million
BRAVO (NBC, CABLEVISION)	70,000
CBN	3.4 million
CMTV	500,000
DISCOVERY (COX, NEWHOUSE, (UNITED, CONTINENTAL)	3.0 million
ESPN (ABC)	3.9 million
FNN	2.7 million
LIFETIME (ABC, VIACOM, HEARST)	3.5 million
MSG (GULF + WESTERN)	478,000
MTV (VIACOM)	3.9 million
NICKELODEON (VIACOM)	3.9 million
SPORTS CHANNEL NEW ENGLAND (NBC, CABLEVISION)	67,000
SPORTS CHANNEL NEW YORK (NBC, CABLEVISION)	184,000
SPORTS CHANNEL FLORIDA (NBC, CABLEVISION)	207,000
PRISM (NBC, CABLEVISION)	28,000
SPORTS CHANNEL AMERICA (NBC, CABLEVISION)	7,000
THE LEARNING CHANNEL	2.0 million
THE NASHVILLE NETWORK	3.3 million
THE WEATHER CHANNEL	3.4 million
USA NETWORK (PARAMOUNT, MCA)	3.9 million
VH-1 (VIACOM)	2.5 million

NBC expressed concern that its news and information service, CNBC, may not be carried by vertically integrated MSOs. Those concerns are unfounded. NBC has for some time had an ownership interest in Arts & Entertainment. It has also recently acquired an ownership position in a number of other program services. ATC carries 11 program services in which NBC has an equity interest, delivering over seven million basic and pay subscribers each month. We did not drop those services when NBC acquired its interest and, in fact, our carriage of those services has increased over the years. This hardly suggests ATC has an incentive to discriminate against CNBC. I should also note that Showtime, HBO's chief competitor, is carried on at least 75 percent of cable systems in which Time Inc. has an ownership interest.

Nor can a persuasive case be made that vertically integrated programmers will deny their services to competing distribution technologies. NTIA looked at whether MMDS operators were denied access to vertically integrated program services and concluded that "there was no discernible pattern between a cable network's ownership affiliation and the likelihood that it will be made available to MMDS operators." NTIA found that a number of vertically integrated program services are distributed by MMDS in competition with the cable industry. It also found that a number of non-vertically integrated program services do not permit MMDS distribution for legitimate reasons having nothing to do with ownership structure.

The state of television today is more positive than it has ever been. There are more program choices than ever. There are more distribution choices than ever. Vertical integration has been an indispensable part of that development by giving cable operators an incentive to develop programming alternatives which make cable attractive to their subscribers.

On a more theoretical level, I do not share the view that television is a negative force in our society contributing to the devaluation of the printed word and undermining critical thought and traditional values. Nor do I believe that it abuses its power to portray and interpret events, and to convey meaning, texture and context to our public life. Does it make mistakes? Yes. Does it need to self-police and critically evaluate the exercise of its enormous power to influence? Yes. Does it have a long road to go in realizing its immense potential? Yes. Does Congress need to continue its oversight of the television business and how it is meeting its important obligations under the Communications Act? Clearly.

Television is one of the most pervasive forces in history and, like it or not, the most influential vehicle for the dissemination of ideas in the world today. While its reach is instantaneous and universal, its impact can be intimate and emotional, and its ability to shape appearance and reality is undisputed. We are ever mindful of this larger reality and our responsibility to enhance the societal benefits which can flow from television through advancing technology and programming leadership into the next century.

Television can do more to educate and inform. Whittle Communications, 50 percent owned by Time Inc., has provided an example with a commercial-supported news program designed for teenagers and delivered to high schools via satellite. The news service allows Whittle to provide high schools with $50,000 worth of state-of-the-art telecommunications equipment, including a satellite dish, master VCR and televisions in every classroom. The potential benefits of this technology for schools are substantial.

Television technology can be expanded to accommodate more speakers who will provide more diverse programs. The cable industry has set the technological pace for television over the last 15 years and it will continue to do so. There has been considerable discussion lately about the potential of fiber technology to increase channel capacity and picture quality. The telephone industry promises to bring fiber into U.S. homes -- but Bell Labs estimates that it will cost telephone ratepayers $200-$500 billion dollars. And it will take 25 years. By contrast, Time Inc.'s ATC has pioneered the use of fiber technology for cable. Because of the unique design of cable systems, our industry will bring the benefits of fiber to consumers for $2 billion and in less than 10 years.

Congress and the Administration have expressed concern that high definition television will be dominated by foreign corporations. American competitiveness and the trade balance lie at the heart of the HDTV debate. Cable is the distribution technology most likely to bring HDTV efficiently to consumers. In fact, HBO and NCTA are this week conducting a major test of HDTV technology on cable systems in the Washington area, using traditional coaxial cable technology, even without fiber. HDTV will not only improve cable industry-developed program services, but also the services of others, such as the broadcasters, whose services are delivered to consumers by cable. We are committed to making every effort to provide non-affiliated program services with the technical capacity they need to deliver HDTV over our cable systems.

Making these visions a reality, however, will take patience, careful planning and an enormous investment of resources from private industry. It will also require risk-taking and the entrepreneurial vitality that has been essential to the history of our industry. In many ways, television is in equipoise. The technology has advanced rapidly in a relatively short period of time. The industry structure is in place to take television to the next plateau. As in 1975, we are prepared to take that step and spend the resources necessary to realize the vast potential of television.

As television moves into the next century, we urge Congress to continue to seek the delicate balance necessary to ensure the development of television in the public interest and at the same time provide the flexibility necessary for the industry to commit time, resources and money to growth. Artificially restricting the industry's structure could freeze technology at its current state and derail consumer benefits like HDTV.

A flexible domestic regulatory environment is particularly critical because of the significant and increasing pace of foreign acquisition of U.S. media and entertainment companies. We do not oppose foreign ownership of U.S. companies; as a matter of principle, however, we believe it is crucial that American companies maintain a leadership role in defining the shape and direction of media and entertainment in this country.

The merger of Time Inc. and Warner Communications Inc. contributes significantly to this goal. I am pleased to be here today to provide the Subcommittee with a full explanation of the merger and its positive implications for consumers and the U.S. economy as we position ourselves for the global marketplace of the 1990s.

I. The Proposed Merger of Time Inc. and Warner Communications Inc. Will Produce Substantial Consumer Benefits

On March 4, Time Inc. and Warner Communications announced that the companies planned to merge. As I said earlier, we are pleased that the Justice Department last week concluded that no basis exists under the antitrust laws to block the merger.

Time Warner Inc. will be a preeminent media and entertainment company and a worldwide competitor in recorded music and music publishing, magazine publishing, book publishing, motion picture and television production, cable television system operations, pay-cable programming and videocassette distribution.

The merger of Time Inc. and Warner Communications Inc. is a bold and, in these days of highly leveraged, debt-financed transactions, a unique response to an increasingly complex and difficult global market. It is a strategic commitment undertaken to achieve important productive business goals, not to realize short-term financial gains. This merger creates a company with the strength and vision to enter the 21st century as a competitive force breaking new ground both here and abroad.

Time Inc. and Warner Communications have an established record of leadership in each of the businesses in which they operate. However, with such leadership comes high responsibility. Since its founding by Henry Luce, Time Inc. has been a journalistic enterprise with a keen awareness of its duty to operate in the public interest.

The merger will enable us to contribute to the fundamental goal of the 1988 Trade Act to strengthen our country's international competitiveness. In addition, it will allow us to continue and expand the remarkable history that we and the cable industry have had over the last 15 years in developing and distributing innovative entertainment and information programming. By combining the production and distribution capabilities of these two companies, we will be able to take chances with new and exciting programs that may not have been developed without this merger.

We are particularly pleased that these goals will be accomplished without the often-devastating impact of a highly leveraged buy-out. The merger will not create enormous debt. The companies' assets will not be broken up and sold for short-term profits. No employees will lose their jobs. This is a grand old-style merger that will have no negative impact on our employees or the communities in which we operate.

A. The Time Warner Merger is an Appropriate and Necessary Competitive Response to the Realities of Today's and Tomorrow's Global Marketplace

Over the past 18-24 months, Congress and the Administration have expressed considerable concern about the need to increase the competitiveness of U.S. industry. American business has been criticized for its failure to anticipate and prepare for the competitive challenge posed by the rapid growth and aggressive acquisition strategy of foreign corporations. Critics argue that long-term strategic planning has been sacrificed for short-term profits. Too often, U.S. companies have been outflanked by large, aggressive Japanese and European companies taking advantage of favorable regulatory, accounting and tax rules in their own countries and the weakening U.S. dollar.

Time Inc. and Warner Communications believe that the responsibility for the competitiveness of U.S. industry lies squarely on the shoulders of U.S. industry. Our merger is a response to that challenge: to become a more significant factor in international trade and services and to increase U.S. ownership of U.S. companies in the media/entertainment/information sector of our economy.

Our central objective is to be competitive, and this requires a strategic, proactive approach that will help redefine the profile of American business in the international marketplace. We are under no illusion that succeeding in that marketplace will be an easy task. However, this merger will greatly enhance our ability to meet the international challenge. Consider two examples:

1. HBO's opportunities to enter the European pay television market have been limited. Its brand name and technical expertise in creating and operating a pay television network, while widely recognized, have not been sufficient to enable it to break into European markets. We believe the combination of HBO with Warner's programming expertise, in light of the European desire for U.S. programming, could be a catalyst in the development of an emerging cable television industry in Europe and could enhance HBO's entry into European pay television;

2. The marriage of Time Inc.'s direct marketing expertise and Warner's production capability will enable the companies to distribute their products more effectively in Europe and Asia. Currently, direct marketing in Europe is dominated by a single West German corporation, Bertelsmann AG, a company that competes with Warner in the music business and with Time Inc. in publishing magazines and books. That reality gives Bertelsmann enormous leverage which is a disadvantage to both Time Inc. and Warner in the direct mail business in Europe. A company like Time Inc., with its experience and expertise in direct marketing

-- as well as its resources -- can help to meet that challenge.

The emergence of a global market and the intensification of foreign ownership of U.S. business is not a challenge for the future. It is a challenge we face today. In the past four years, foreign corporations have increasingly viewed the United States as an attractive market, spending over $100 billion to acquire a wide range of U.S. businesses.

Moreover, a significant level of foreign acquisition has focused on First Amendment sensitive U.S. media and entertainment companies. In our view, this poses special issues related to the integrity of the dissemination of news and information by U.S. companies and the protection of U.S. creative talent. As the following chart demonstrates, foreign acquisition has brought these issues into sharp focus.

Selected Major Foreign Acquisitions of U.S. Media

Foreign Company (Country)	U.S. Company Acquired	Type of Business	Year	Purchase Price (millions)
Sony Corp. (Japan)	CBS Records	Records	1987	$2,000
Bertelsmann AG (W. Germany)	Doubleday (included Bantam, Dell, Book Club Associates)	Books	1986	$475
	RCA, Arista Records	Records	1986	$325

Foreign Company (Country)	U.S. Company Acquired	Type of Business	Year	Purchase Price (millions)
Hachette S.A. (France)	Grolier, Inc.	Educational Books	1988	$450
	Diamandis Communications	Magazines	1988	$712
Maxwell Communications Corp. (Great Britain)	MacMillan	Books	1988	$2,500
	Dun & Bradstreet's Official Airline Guide	Books and Specialty Magazines	1988	$750
News Corp. Ltd. (Australia)	20th Century Fox	Movie Production	1985	$575
	Ziff Davis Publications	Magazines	1985	$350
	Metromedia	TV Stations	1986	$1,550
	Harper & Row	Books	1987	$300
	WXNE-TV	Boston TV Station	1987	$28
	Triangle Publications	Magazines	1988	$3,000
Qintex Group (Australia)	MGM/UA	Film and TV Production/ Distribution Videocassettes	1989 (pending)	$800
S. Pierson & Co. PLC (Great Britain)	Addison-Wesley	Educational Books	1988	$283

Foreign Company (Country)	U.S. Company Acquired	Type of Business	Year	Purchase Price (millions)
Rank Organization PLC (Great Britain)	Universal Studios (Florida) (50%)	Movie/TV Production	1989	$150
	BHCP (Columbia, Paramount, Bell & Howell)	Videocassette Duplication	1988	$120
Thorn-EMI (Great Britain)	SBK Entertainment World, Inc.	Music Publishing	1989	$337
TVS (ITV Station) (Great Britain)	MTM Productions	TV Production	1988	$340
Carlton Communications (Great Britain)	Technicolor	Film Processing Video Duplication	1988	$780
Filmtrax (Great Britain)	Columbia Pictures Music Group/ Ivan Mogull Music	Music Publishing	1988	$70
L'Oreal (France) (49% owned by Nestle, S. A.. of Switzerland)	Filmation (Group W subsidiary)	Film and TV Animation	1989	$30
Pathe Entertainment (Italy)	New World	Movie/TV production studio	1989 (pending)	$263
Pathe Communications (Italy)	Cannon Group (62% interest)	Movie production studio European theatres	1989	(stock exchange)
Reed International (Great Britain)	Technical Publishing	Magazines	1986	$250
Holtzbrinck (W. Germany)	Scientific-American Inc.	Magazines	1986	$53

Foreign Company (Country)	U.S. Company Acquired	Type of Business	Year	Purchase Price (millions)
United Dutch Publishing Companies (Netherlands)	Hayden Publishing	Magazines	1987	Unknown
United Newspapers PLC (Great Britain)	Medical World News	Magazines	1987	Unknown

This trend shows no signs of abatement. Last week Qintex Group, an Australian company, announced a complicated transaction to acquire United Artists, including MGM/UA Home Video, for an effective price of about $800 million. Both Sony Corp. and Matsushita, two Japanese companies, and Phillips, N.V., are reportedly seeking to acquire U.S. movie studios. Recent press reports indicate that foreign media conglomerates are amassing new funds to go after additional U.S. companies.

Although the statistics demonstrate a startling trend of increased foreign ownership of U.S. companies and particularly media companies, they do not tell the whole story. Recent activity in two industries demonstrates the broad social and political impact of foreign acquisitions.

In the past five years, it has been virtually impossible for a U.S. company to acquire a domestic publishing company of any significant size. As the above chart points out, Ziff Davis

Publications, Triangle Publications, Doubleday, Grolier, Inc., Diamandis Communications, MacMillan, Hayden Publishing, Technical Publishing, and Medical World News have been acquired by foreign companies. Time Inc. understands this phenomenon only too well. Recently we considered making a bid to acquire Addison-Wesley, an American school textbook publisher. However, because of the substantial regulatory and accounting advantages foreign companies enjoy and the weak dollar, it was sold to the British firm, S. Pierson and Co.

Similarly, in the last few years foreign corporations have acquired a major position in the record business. This is a business that was born and nurtured in the U.S. Now the industry is controlled by foreign corporations with worldwide distribution networks such as Sony, Bertelsmann AG, Thorn-EMI and Phillips. Warner Communications has been a major force in the record business. It was an exhilarating experience as American creative, technical and business genius came together to create a new form of entertainment that has had a profound impact on whole generations of Americans. It is with concern that we have watched the U.S. lose control of the heart of this industry.

I want to be very clear, however, that we are not asking Congress to protect us from foreign acquisition by erecting barriers to entry into U.S. markets. We oppose such governmental intervention and are not seeking it here today. We believe there is nothing inherently wrong in foreign acquisitions of U.S. companies and in some cases such acquisitions produce important benefits. We believe U.S. industry can and ultimately will respond to this challenge. However, U.S. industry cannot be asked to enter this fight with its arms tied behind its back. We can succeed. But, we need a government approach that addresses the problems and opportunities of the future, not those of the past. Strategic mergers like the one entered into by Time Inc. and Warner Communications are a part of the future, and from where we sit that future looks bright.

B. The Merger Presents No Competitive Problems Under Any Conceivable Antitrust Standard

Mr. Chairman, you have expressed interest in the legal implications of this merger under the antitrust laws. We believe, and the Justice Department has confirmed, that the merger is consistent with long-established precedent under those laws. We cooperated fully with the Justice Department review and have spent considerable time discussing these issues with the Subcommittee staff. In the interest of creating a complete record to faciliate the Subcommittee's consideration, I would like to take the time to explain why we believe the merger presents no antitrust problems.

With few exceptions, there is little overlap in the core business activities of Time and Warner Communications and the merger does not change the competitive position of any of our businesses. We essentially operate in different areas. The merger is a good fit of complementary communications skills and activities, which creates a well-rounded company that will be able to compete effectively in the international communications market in the coming decades -- on an equal footing with large and aggressive foreign competitors.

We have outlined below the main areas in which Time Inc. and Warner Communications Inc. operate.

1. Movies/Television Programs: Although Warner is a major producer/distributor of theatrical movies and TV programs, it has only 10 percent of this field. Time does relatively little in this field -- mainly at HBO.

2. Magazines: Time is a major publisher of magazines. Warner does relatively little in this field -- principally comic books.

3. Records: Warner Communications Inc. is a major record company. Time Inc. does very little in this field -- primarily mail-order sales of compilations of previously released recordings.

4. Cable Networks: Time Inc. operates HBO/Cinemax. Warner Communications Inc. no longer operates any cable program services; within the last few years, it has sold its interest in Showtime, MTV, Nickelodeon and The Movie Channel.

5. Music Publishing: Warner Communications Inc. is a major music publisher. Time Inc. has only nominal music publishing interests.

6. Books: Time is a publisher and direct marketer of books through Time-Life Books and operates the Book-of-the-Month Club, Little, Brown and Scott Foresman. Warner Communications primarily publishes paperbacks; it has no book club.

Thus, in most of our core businesses, we are basically not in competition. There is no significant overlap. There are, however, a few fields in which we both operate. But, even where some overlap exists, there are no significant issues raised under the antitrust laws.

1. Cable Television: Time and Warner Communications both operate cable television systems but in different local markets, not head-to-head. The cable industry is not concentrated -- it falls well below the concentration guidelines established by this or prior Administrations. Neither firm has a large share of national subscribers. Time Inc. has about 8 percent of U.S.

subscribers; Warner Communications Inc. has about 3 percent. So, together we have only 11 percent -- far behind the largest company, whose estimated number of subscribers approaches 25 percent.

2. Videocassettes: We both distribute videocassettes. But again, the market is not concentrated under any antitrust analysis. And neither company has a large or significant market share. Warner has about 11 percent; Time about 5 percent.

3. Magazine Distribution: Both firms distribute magazines, but the publishers set the prices and discounts. Moreover, Time and Warner Communications basically distribute different types of magazines to different audiences and perform different services for their customers. Also, Warner -- unlike Time -- mainly distributes magazines owned by outside publishers under short-term agency contracts. For most of its magazines, Warner provides no in-store sales force. Warner is principally an agent which bills and collects. Its major magazines are produced by publishers who use their own sales forces. Time Inc. has a very active field force supporting its magazines.

In sum, in the few areas in which there are overlaps, the overlaps are minimal and do not result in any diminution of competition.

II. Cable Television is the Most Heavily Regulated Technology in the Highly Competitive Video Distribution Business

Some have proposed sweeping changes in the structure of the cable industry under the assumption that cable systems are unregulated monopolies. I strongly disagree with that assumption. Cable systems are neither unregulated nor monopolies.

Although the Cable Act removed in most cases the authority to regulate basic rates, it left in place an extensive set of regulatory tools by which municipalities can influence a cable operator's behavior. The most significant of these tools is the right to deny renewal of the franchise. The power literally to force a cable operator out of town gives municipalities considerable leverage. They regularly exercise that leverage in creative ways to extract expensive commitments from cable operators, for example, to increase channel capacity, build institutional networks, provide public access facilities and funding and produce local origination programming. ATC recently concluded a lengthy refranchising process in Honolulu, Hawaii, in which we agreed to provide additional services and facilities that will cost $50 million over the term of the franchise.

The Cable Act provides municipalities with other regulatory options, including the right to collect franchise fees, regulate certain services, facilities and equipment, and require public, educational and governmental access channels. Cities can also grant a second cable franchise if the incumbent operator's price or service is unsatisfactory. The relatively small number of overbuilds, however, indicates that cable operators have generally provided quality service at reasonable prices. If they had not, overbuilders would have come in to drive prices down.

The Act also establishes significant federal regulations related to ownership of cable systems, subscriber privacy, commercial access, consumer protection, and equal employment opportunities.

Cable's regulatory structure is far more extensive than any of its competitors. Cable is regulated at the local, federal and, in some cases, state levels. Broadcasters have no regulation at the local level. VCRs are completely unregulated. Home dish distributors are unregulated. MMDS and SMATV operators are unregulated, pay no franchise fees, provide no access facilities and do not provide service throughout a franchise area.

The marketing of cable is a complex and ever-changing task. Balancing these business challenges against the considerable regulatory authority vested in the municipality under the Cable Act requires the cable operator to maintain constructive, responsive relationships with the city and to monitor constantly his rates and customer service.

Mr. Chairman, you have raised the issue of cable rate increases during the adjustment period since rate deregulation became effective in 1986. As you know, GAO has under way an extensive study looking at that question. In addition, the Cable Act requires the FCC to report to Congress on the impact of rate deregulation next year.

Mr. Mooney is here today to discuss this issue on behalf of the cable industry. However, ATC's rate increases since deregulation have been moderate. In a recent independent study, Columbia University Business School professor Michael Salinger concluded that "ATC charges less for basic service than other [cable] systems do."

It is critical to understand that cable basic rates were held artificially low by local regulation for over 15 years. The Cable Act contemplated a period in which those rates would adjust themselves to reflect the value of the service. Also, as we predicted in 1984, pay cable rates have declined during this transition.

Cable rates have also been impacted by dramatic increases in the cost of programming, particularly sports programming. Since

1986, ATC's rate increases for basic service have been about 9 percent per year and have been accompanied by new and expanded services. However, ATC's program costs have gone up astronomically at an annual rate of about 30 percent. A significant amount of this additional programming cost has not been passed along to the consumer by ATC.

Basic cable is a good value, particularly when compared with competitive alternatives. A family of four can get dozens of program services 24 hours a day for an entire month for the price of going out to the movies once. Over 48 million homes have responded positively to this price\value comparison.

Nor is cable a monopoly. To the contrary, cable operators face significant competition which constrains their pricing. When Congress passed the Cable Act, it recognized that cable competes in a broad video entertainment marketplace. In its Report on the legislation, the Senate Commerce Committee noted that "cable faces major competition from such sources as MDS, MATV, SMATV, DBS, STV, television, radio, movie screen, videocassettes and videodiscs, LPTV, and other media." Some of these competitors, such as STV and MDS, have not proved successful in this competitive environment. But, others, like home dishes and MMDS, have arisen to assert a competitive presence. Members of this Subcommittee have undoubtedly seen the satellite dish proliferating on rooftops and in backyards as they have travelled throughout their home states.

Most important, cable faces competition from a pervasive and well-established broadcast industry. The three networks still account for nearly 70 percent of all national viewing during prime time. That reality has led to the creation of a fourth national broadcast network by Fox Television. While almost 99 percent of all U.S. homes have a television set, only about 55 percent of all those who have access to cable actually subscribe. Clearly, the 45 percent that do not subscribe believe they have alternatives to cable.

Broadcasters are powerful competitors at the local level. In addition to the network affiliates, independent television stations are thriving. Since 1980, the number of independent television stations has more than doubled from 121 to nearly 300. Independent broadcast station audience share has risen steadily. Also, between 1980 and 1986, independent station advertising revenues rose from $1.087 to $2.856 billion, a 162 percent increase. The value of independent stations and their overall revenues have also increased sharply. Broadcasters provide high quality programming that is an attractive option to cable. Nearly half of all consumers choose that option over cable.

A second significant competitor is the VCR. In some ways the VCR complements cable by allowing consumers to time shift programs. However, there is no question that the VCR also competes directly, with cable, particularly pay television. The VCR has been the fastest growing consumer electronics device ever and is now in over 60 percent of all U.S. homes. As a past Chairman and President of HBO, I can tell you that the VCR has had a very significant negative impact on pay cable's growth. That competition impacts the cable operator by reducing the revenue it can derive from the sale of pay cable services. In addition, if a consumer perceives that the VCR is a substitute for pay cable, that reduces the attractiveness of the cable operator's overall offering, thereby impacting basic service as well. ATC's research indicates that consumers who do not subscribe to cable believe that the combination of the VCR and over-the-air broadcasting provide them with all the television they need.

All the factors I have mentioned constrain the cable operator's ability to raise prices and are factors that he must consider in making pricing decisions.

The prepared testimony of Mr. Mooney contains extensive data on the competitive status of the video marketplace. Rather than repeat those arguments here, I would like to cite a few examples of competition that ATC cable system managers face in the field:

1. Orlando, Florida -- ATC has cable systems that serve

nearly 200,000 subscribers in Orlando. Florida Power & Light, a company with 1987 annual revenues of $4.4 billion, has been aggressively overbuilding our cable system and competing head-on for those subscribers. We are often challenged by other potential overbuilders.

2. New York City -- ATC's largest operating cable system is in Manhattan, and we are undertaking our largest new construction of a cable system in Queens. In New York City we compete directly with Microband, the oldest and largest MMDS operator in the country. In fact, Microband distributes HBO in direct competition with ATC. Microband has 48,224 HBO subscribers in the New York City area.

3. Denver, Colorado -- ATC began operations in Denver in 1983. In the six years since that time, we have achieved less than 35 percent penetration. Over 65 percent of consumers in Denver have opted not to subscribe to cable. We believe that is because they have significant alternative ways to receive video programming, most notably a thriving broadcast television industry.

4. Indianapolis, Indiana -- an experienced SMATV operator has wired a number of multi-unit dwellings in competition with ATC's cable system. In the Indianapolis suburbs, the SMATV operator has used public rights-of-way without obtaining any

authority, or accepting any obligations, from the franchise authority.

Mr. Chairman, I note the suggestion of some that eliminating the cable/telephone cross-ownership ban would enhance competition in the video marketplace. There is a substantial body of historical evidence and no small number of expert witnesses to contradict that assumption. Bell Operating Company entry into television would invite the types of anti-competitive behavior that initially resulted in the AT&T divestiture. The telcos still retain the ability to cross-subsidize and I believe that no form of regulation will ever be devised to police this practice effectively.

Also, the claim that telcos can offer services not offered by cable companies is simply not true. Notwithstanding the fact that telcos have repeatedly attempted -- sometimes successfully -- to impede the development of cable-enhanced services, the cable industry has demonstrated its willingness and ability to develop cable and fiber optic technology to its fullest potential.

By their own estimates, authorizing the Bell companies to update their plant to provide television would cost telephone ratepayers $200-$500 billion. The effect on consumers would be equally disastrous.

An even more fundamental question is at stake in assessing a society in which telephone utilities replace broadcasters and cable operators as the principal programmers of video news, entertainment and information. Telco entry would usher in a dramatic reordering of the communications system in this country and Congress should reject such a result as totally without justification.

We believe cable television is the best way to distribute video programming in this country. Cable is a superior distribution technology and we have used it to offer consumers a service that we believe is better in many respects than our competitors. But, the fact that we may be better than our competitors does not mean we have no competition. In all our decisions, we are driven by the relentless search to better understand and respond to our customers, and by the knowledge that if we do not, someone will come along and take our business away.

III. Satellite Program Distribution Policies are Designed to Maximize the Quality and Availability of Programming for Consumers

In 1986, HBO Chairman Michael Fuchs testified before Congress that HBO's goal was to get its program services in every home in America. Time Inc. supports that goal, and HBO's business decisions are guided by it. It has pushed us to design services that bring consumers a wide variety of programming that is interesting and important, as well as entertaining. HBO programs like the Academy Award-winning show on kids with cancer, "You Don't Have to Die," as well as the Simon Weisenthal story, "Murderers Among Us," and "Dear America: Letters Home from Vietnam" are setting the standard for important, meaningful programming.

For national program services like HBO, a broad distribution system is critical. Today HBO and over 60 other program services are available to virtually all American homes through a vast, satellite-connected, national distribution network.

Given the wealth of programming available today, HBO is not an essential program element for anyone seeking to offer a package of program services in competition with cable. In fact, some cable competitors have argued that it is more important to obtain rights to basic services than pay services like HBO. In a hearing before a House Judiciary Subcommittee last month, one MMDS operator, Jim Theroux, made this point very clearly in characterizing his strategy for competing with cable: "Where cable has you is in basic cable -- live sports, music television, live news. And so really you have to look at basic cable."

Many believe the competitive nature of video programming makes it necessary to distinguish one's product or service so that consumers will choose it from among the various alternatives. One common way to accomplish this is to secure exclusive rights to distribute a program service in a particular geographic area. The broadcast industry, for example, recently won reinstatement of the FCC's syndicated exclusivity rules, allowing them to contract for and enforce the exclusive right to distribute programs in their service area. If those rules are upheld, that right should be available to cable operators and satellite programmers as well.

From HBO's perspective, program exclusivity produces some important benefits. A single distributor of HBO in a geographic area has the incentive to aggressively market HBO. Single distributors are more likely to spend money advertising HBO and designing marketing schemes to sell the service. They are more likely to spend the time learning about HBO's product and developing a sales staff that understands HBO sufficiently to make it a most attractive option for the consumer. A single distributor has the incentive to strongly push our services.

The presence of a second distributor may reduce that incentive because any effort the original distributor makes to enhance the attractiveness of HBO would also benefit its competitor, the second distributor. The original distributor may begin to shift his marketing efforts to those services which are unique to him and not distributed by his competitor. It is understandable that the cable operator wants to promote that service which will differentiate him from his competitors.

HBO distributes its services directly by C-Band dish and generally retains the ability to sell through competing, non-cable distributors. HBO has historically sought wide distribution of its programming through a variety of competing distribution mechanisms. HBO has used every distribution technology that has been available since its inception in 1972. (The one exception is subscription television -- STV. HBO was unsuccessful in obtaining the necessary copyright licenses to allow it to distribute movies by STV.)

In many cases, we pioneered technological developments that were necessary to create new, competitive distribution sources. For example, HBO supported deregulation of small receive-only "dishes" in 1977. This, coupled with HBO's decision in 1986 to scramble its services, resulted in distribution of satellite programming directly to home dish owners. Similarly, in the 1970s, HBO sought distribution of its services through MDS operations. I negotiated the first MDS entertainment programming agreement as HBO President in 1974.

HBO's efforts to extend distribution of its services have not always brought about positive business results. Some distribution alternatives did not succeed in the marketplace. In those cases, prudent business practice required limiting distribution through such technologies.

We are in a fiercely competitive business. There are numerous ways to see a movie -- VCRs, over-the-air broadcasting and movie theatres. We have to ensure that, at the very least, consumers have the option to see movies on HBO. That is why it is and will continue to be our policy to use all economically and technically viable video distribution technologies.

Below, I discuss the history and current status of each of the ways in which HBO has attempted to deliver its services.

1. Cable Television. Cable television is HBO's primary distribution source. We have approximately 7,000 cable affiliates that account for over 23 million subscriptions. The cable industry offers an efficient, nationwide distribution system which reaches over 85 percent of the homes in this country. Cable operators understand the complex and dynamic nature of the pay television business and have a extensive knowledge of HBO's program services. Cable is a solid business which offers HBO stable profitability and quality distribution of our services.

2. Videocassettes. Since 1984, HBO has been involved in the distribution and sale of videocassettes. Through HBO Video, Inc., a major videocassette distributor, we currently distribute videocassettes to wholesale distributors who in turn sell the cassettes to video retail outlets across the country. Predominantly these videocassettes are feature films, including films that are carried on HBO's program services and some that are made for original exhibition on HBO.

3. Home Dishes. HBO offers home dish owners five alternative ways to receive our services: 1) directly from HBO through a toll-free 800 telephone number; 2) from the dish retailer who can arrange an annual subscription for our services; 3) through the National Rural Telephone Cooperative (NRTC), a subsidiary of the Rural Electrification Administration, which has over 500 local co-ops across the country; 4) through the local cable operator; and 5) through a national package offered by Turner Broadcasting.

A dish owner who subscribes to HBO and Cinemax on an annual basis (as over 80 percent of our dish customers do) can receive the services for $[illegible] 48 per month each. That price is three dollars per month less than the average national price paid by a cable subscriber for HBO.

HBO also offers dish owners the ability to create program packages, selecting from the following services: HBO, Cinemax, ESPN, CNN, Headline News, USA Network, Christian Broadcast Network, The Weather Channel, Lifetime, Primetime 24 (three broadcast network affiliates), WWOR (NY), WSBK (Boston), KTLA (Los Angeles). The prices for these packages are comparable to that paid by cable subscribers for a package of program services.

4. Satellite Master Antenna Television Systems (SMATV). Since the early 1980s, HBO has provided its services through SMATV operations to commercial properties, such as hotels, motels and residential apartment buildings. Some aspects of this business are thriving. For example, HBO has a large number of subscriptions from hotels and motels. That segment of the SMATV business is profitable and growing.

SMATV distribution to apartment houses has not been successful. HBO distributes its services by SMATV to apartment houses in two ways: 1) we have entered into direct affiliations with several large volume, broadly distributed SMATV operators; and 2) we actively encourage our cable affiliates to subdistribute our services to SMATV operators in their areas -- over 800 SMATV properties reaching over 250,000 households have been authorized in this way, generating over 67,000 subscriptions.

The results from our direct affiliations have been disappointing. We have entered into four such arrangements. One of the four companies has gone bankrupt. Another is in the process of selling off its SMATV properties on a piecemeal basis. The performance of the remaining two companies has been far below expectations. One of the companies projected 1987 year-end HBO subscribership of 35,000 -- actual subscribers were only 13,000. The other company projected 1987 year-end HBO subscribership of 90,000 -- actual subscribers were only 20,000.

5. Multi-Point Distribution Service (MDS). HBO has been distributed via MDS since 1974. HBO was a pioneer in MDS and by 1982 we had 32 MDS affiliates in 28 cities serving 372,000 subscribers.

Beginning in 1982, however, the MDS business encountered serious reversals for a variety of reasons, including rampant theft of service and the growth of cable television. The MDS signal was not secure and was easily intercepted by pirate MDS receivers. From 1982 through 1985, HBO spent over $400,000 prosecuting theft of service cases.

Notwithstanding HBO's efforts to support MDS, 14 MDS affiliates have declared bankruptcy or gone into receivership. We have been forced to write off more than $6 million in receivables from MDS affiliates, a rate of delinquency unheard of among our cable affiliates. By the middle of 1986, HBO had only 24 MDS affiliates in 16 cities serving 146,000 subscribers -- a decline in subscribership of over 61 percent in less than four years.

Theft of MDS services continues to be an enormous problem for HBO. HBO is distributed in an unscrambled form by MDS operators in seven large metropolitan areas. We believe that over one million households per month are now illegally intercepting unscrambled MDS transmissions.

Recently, HBO has been approached by a small number of multi-channel MDS (MMDS) operators seeking to distribute our services. MMDS is a relatively new and unproven technology. Given the history of MDS, HBO believes it is prudent to proceed in a careful manner with MMDS.

Decisions about whether to adopt a new distribution technology have serious economic consequences. Not only does HBO have significant out-of-pocket losses from its distribution by MDS, it has suffered enormous lost opportunity costs. As I have said, over a million people a month are now illegally receiving HBO from unsecured MDS transmissions. Over the past four years, that represents a $200 million lost opportunity for HBO. This opportunity loss is a result of the fact that in the mid-1970s we moved too quickly, without sufficient testing and analysis of MDS.

We have some legitimate concerns with the ability of MMDS operators to distribute a signal that is technically secure. We have recently experienced significant problems with a scrambling system for our HBO satellite feed. Only four years ago we believed that scrambling system was secure. Now it has a theft rate approaching 50 percent. We are also concerned with the financial security of MMDS operators because of our negative experience with undercapitalized MDS operators who often lacked the strength to effectively market and distribute our services. When a distributor provides poor or inefficient service, that ultimately reflects badly on HBO with the consumer.

Some have stated that MMDS can provide a secure signal and that MMDS operators can obtain sufficient financial backing. We are open to those views and want to determine whether MMDS is sufficiently distinguishable from MDS so that it provides efficient and secure distribution of HBO. Given the enormous economic stakes and the past history of this technology, we want to make this determination carefully.

That is why HBO has entered into a large-scale test of MMDS with Microband, the largest MMDS distributor. Under this experiment, Microband will include HBO in an MMDS service in three metropolitan areas -- New York, Washington, D.C. and Detroit.

HBO's distribution policies have worked well for the American consumer. Cable is the most secure mechanism for delivering television services. In just 17 years since we first began service, HBO has become the largest brand name subscription service in the world. We have not accomplished this significant feat by artificially limiting distribution of our services. We have done it by offering consumers quality services through a variety of distribution systems.

IV. Time Inc. Supports Cable Carriage of Local Broadcast Signals and Is Committed to Statutory Embodiment of the Must-Carry Rules

I want to turn now to must-carry, which I know is of concern to you, Mr. Chairman, as well as other members of Congress and our colleagues in the broadcast industry. I want to assure you that Time Inc. is committed to the carriage of local broadcast signals and strongly supports NCTA's current efforts to negotiate a statutory embodiment of must-carry.

There is some history to must-carry that should be briefly reviewed here. Twice in the last four years the U.S. Court of Appeals for the D.C. Circuit has ruled must-carry unconstitutional. Notwithstanding these decisions, the cable industry has made clear its intention to continue to carry local signals by entering negotiations to reinstate a new must-carry scheme. After the 1985 Quincy decision, the cable industry reached a must-carry agreement with the broadcast industry that was ultimately expressed in a rule of the Federal Communications Commission (FCC). Again, after the 1987 Century decision invalidated the FCC rule, NCTA President Jim Mooney publicly committed the cable industry to negotiate yet another must-carry rule. Time Inc. and Warner Communications both strongly support this approach.

Our cable company, ATC, has an outstanding record of carrying local broadcast signals over the last four years even in the absence of must-carry rules. Warner Cable has a similar record. We carry local broadcast signals for one simple reason -- it is valuable programming that our customers want. Broadcast programming is a central element of the overall cable offering and we do not envision a time when that fundamental dynamic will be changed. It is in our interest, the broadcasters' interest and, above all, the consumers' interest to capitalize on the synergies between the broadcast and cable industries. Time Inc. is committed to resolving must-carry and related questions in a way that is mutually beneficial for all parties.

Some broadcasters have raised channel positioning as a element of must-carry. This is a difficult issue. On the one hand, we understand that broadcasters do not want to suffer a disadvantage by being shifted repeatedly or by being assigned to channel positions that they believe are inferior. We certainly oppose channel repositioning as a device to deny consumers the ability to view broadcast services.

On the other hand, we do not believe broadcast signals ought to have an automatic right to the best channel positions to the exclusion of other valuable services, such as the USA Network, Arts and Entertainment Network and C-SPAN. We see no public policy rationale for presumptively favoring one class of program services over another.

There are merits on both sides of this issue. Channel positioning will be addressed in the industry must-carry negotiations. Time Inc. and Warner Communications will play a positive role in that debate.

Also, as I have mentioned earlier, we believe that when HDTV is developed, broadcasters ought to be able to use that technology to improve their services. We are committed to making every effort to provide them with the technical capacity they need to deliver HDTV signals over our cable systems.

In short, the history of Time Inc. and the cable industry demonstrates a commitment to the carriage of local broadcast signals. Our cable operations are consumer-driven businesses.

Our goal is to provide consumers with the programs they want to watch. If we fail in that goal, our customers will go elsewhere for their video entertainment. We believe broadcast signals are valuable to our customers. That is why we want to and do carry them.

V. Conclusion

In conclusion, Mr. Chairman, I want to thank you for the opportunity to come before you today to discuss the Time Warner merger and related cable industry issues about which this Subcommittee has expressed concern. Since the earliest days of its oversight of communications policy in this country, Congress has set forth one preeminent goal which has stood above all others: diversity. Since the mid-seventies, cable television has changed the way Americans use, enjoy and learn from television. It has created a new world of video programming.

The regulatory flexibility established by the 1984 Cable Act has allowed the cable industry to accelerate programming investments and other equally important investments in the area of technology. We have done that in a free marketplace which is both competitive and dynamic, and by that I mean ever-changing and evolving. It is my hope and expectation that as we enter the 1990s, the public will be served as never before by an even greater diversity of quality services through cable television.

Senator **Metzenbaum**. Thank you very much, Mr. Levin. There is a roll call in progress at the moment. There will be a 10-minute recess so that the members of the committee can go and cast their votes.

[Recess.]

Senator **Metzenbaum**. I apologize for the delay. I should not have taken that long, but I got tied up.

Mr. Levin, I think you had concluded your statement. We are now happy to hear from James P. Mooney, President of the National Cable Television Association. Mr. Mooney?

STATEMENT OF JAMES P. MOONEY

Mr. **Mooney**. Mr. Chairman, we have submitted an extensive prepared statement, and I just want to mention some key points from it.

During the 4 years since passage of the Cable Act, a great deal of change has occurred in our industry. For one thing, the quality of cable programming has improved a great deal. A Roper poll done for the broadcasters and released last week says that people now think cable offers better children's, educational, cultural, and general entertainment programming than conventional television, and that the overall quality of cable programming is better than on conventional television. The way we have been able to do this is to plow a lot of money back into programming which nobody in the conventional television business was willing to support.

Cable networks like Discovery, which does all documentary programming, and Nickelodeon, which is a children's channel, and Black Entertainment Television, which is aimed at minority audiences, to name just a few, all have been made possible by cable industry investment. C–SPAN is another example. If cable operators did not put up the money to create C–SPAN and support it on a continuing basis, it simply would not exist.

Now, in the language of economists, all of these are examples of vertical integration between cable operating companies and the programming sector. The first point I want to make, then, is that vertical integration can be a good thing as well as a hindrance, that it can have socially beneficial results.

The second point I want to make has to do with the consumer getting value. There has been a great deal of comment lately about rising prices for cable basic service, and, undeniably, cable basic rates have risen since being deregulated in 1986. Yet there are two sides to this story, too. During the 10-year period prior to deregulation of basic rates in 1986, the CPI outran basic rates by 50 percent. That was principally because we had been subject not to public utility commission regulation, but to political regulation by city councils, many of which simply sat on rates—which is to say our revenue—while extracting from us every uneconomic expenditure that could be dreamt up.

So it should not be surprising that cable basic rates increased following deregulation. According to the Bureau of Labor Statistics of the Department of Commerce, during the first 2 years of rate deregulation, the average subscriber's bill went up 14.5 percent, yet the average cable consumer today gets 35 channels of television for an average of $14.60 a month, about 50 cents a day. And compared to taking a family of four to the movies just once a month, this is still a good buy.

Two final points. I have listened to Mayor Volgy's testimony, and while it is not my purpose to debate with him, I would like to offer our perspective on some matters related to his statement.

First, the Cable Act deregulated rates but left intact the ability of cities to impose a whole array of economic requirements on cable system, and Mayor Volgy's own city has distributed a cable primer which says that the city of Tucson is getting 12 percent of that system's gross revenues as a result of obligations imposed by the city. This is not unusual. Since 1985, we have paid franchising authorities over $2 billion in franchise fees alone. It is not unusual, either, when licenses are transferred for the city to require a large payment in cash as a condition of approving the transfer. That happened in Laredo just last fall.

Second, and with great respect to Mayor Volgy, if he believes phone companies can offer genuinely fair competition operating side by side with the cable system, and do so without digging into the telephone consumer's pocket for cross subsidies, he must also believe that the cable business is not a natural monopoly. If that is true, it is within his power to create more competition for cable in Tucson by granting a second cable franchise, because, as has been said, very few of these franchises, almost next to none, are exclusive. Cable operators do not have a right to be the only supplier in town.

I would like to close, Mr. Chairman, not on a note of disagreement, but with the thought that we are fully aware there is dissatisfaction in some places about cable prices and customer service. We do not claim to be perfect, and we respectfully acknowledge that many members of Congress have legitimate concerns. Yet we are working to correct our shortcomings. And while some of us are still falling short, a lot of us are doing a good job. We ask only that the committee look at both sides of the story.

I would be happy to answer any questions you might care to put.

[The prepared statement of Mr. Mooney follows:]

STATEMENT OF JAMES P. MOONEY

PRESIDENT AND CEO OF THE NATIONAL CABLE TELEVISION ASSOCIATION

BEFORE THE SUBCOMMITTEE ON ANTITRUST, MONOPOLIES, AND BUSINESS RIGHTS

OF THE SENATE COMMITTEE ON THE JUDICIARY

APRIL 12, 1989

Mr. Chairman, members of the Subcommittee, my name is James P. Mooney. I am President and Chief Executive Officer of the National Cable Television Association. NCTA represents over 2,700 cable television systems, serving more than 80% of the 49 million cable households in the United States, and 56 cable programming services engaged in creating and packaging a great diversity of cable television programming.

NCTA appreciates the opportunity to appear before you today. I would like to discuss in some detail three broad areas. First, I would like to review those historical events and the political environment that led to Congressional recognition of the need for a comprehensive national policy for cable television. Second, I would like to discuss the major provisions of the Cable Communications Policy Act of 1984, both in terms of what we believe Congress intended by them and how judicial action and municipal regulatory actions have influenced the implementation of these provisions. Finally, and most importantly, I would like to survey the impact that this landmark legislation has had on the way cable television serves the American public and how that, in turn, has changed the entire nature of television.

In summary, since enactment of the Cable Act:

- Basic service rates have increased but premium service rates have decreased. The net bill for consumers has risen only six to eight percent annually. Cable television represents the best entertainment and information value for consumers today providing an average 35 channels of diverse programming for less than 50 cents a day.
- The structure of program offerings has been significantly simplified for consumers.

- Investment in plant and equipment has increased significantly and the last remaining cities to be wired for cable are now being wired.
- Cable has become a more effective competitor.
- Franchise fees now represent a significant source of revenue for cities.
- Substantial investments have been made in cable programming, with many new networks now in existence and significant improvements made in the quality of cable television programming.

Mr. Chairman, I believe that the cable industry is realizing the promise of the Cable Act. The Act promised the cable industry a fair and stable regulatory environment. In return, the industry promised to strengthen its service and to increase the entertainment and information choices available to American television consumers.

I. THE HISTORY OF THE CABLE TELEVISION INDUSTRY

The cable television industry's history has been intertwined with regulation. Cable began in 1948 as a service to individuals in mountainous and geographically remote areas who could not receive over-the-air television signals. It served as a local or "community" antenna service that picked up broadcast signals and distributed them by coaxial cable to subscribers for a fee. The first cable television systems were small local ventures, and these systems still represent a substantial percentage of the cable industry.

As cable developed in its early years, municipal involvement was generally limited to authorizing the use of local streets and rights of way and to adopting regulations to protect the safety of life and property. These first cable television franchises or licenses were generally granted upon the application of a prospective operator. In 1952, cable systems were operating in 70 communities serving 14,000 subscribers. By 1955, community antenna television, as cable was known then, had 150,000 subscribers in 400 systems.

In order to expand from remote areas into areas where over-the-air television signals could easily be received, however, cable operators had to provide potential subscribers with something more, something different from what the local broadcasters provided. As cable began to offer such programming alternatives, the line was crossed between cable service as a means to provide mere broadcast retransmission and cable as a means to provide alternatives to broadcast network programming.

The real catalysts in cable's conversion from an antenna service into a competitive source of programming were the development and availability of satellite technology and cable's entrepreneurial willingness to pioneer that technology as a means for national distribution of made-for-cable programming.

In 1975, Time, Inc., invested approximately $30 million and began satellite distribution of Home Box Office (HBO), which until then was primarily distributed over its Manhattan cable system. According to the prevailing wisdom of the "experts" at the time, the move was risky and would not return significant revenues. However, by 1978 HBO had over one million subscribers on almost 400 cable systems, and the era of premium cable programming was born.

Similarly, in 1978, Viacom, another major cable operator, began satellite distribution of Showtime as a competitive alternative to HBO. They later acquired both MTV and Nickelodeon, cable networks devoted to music videos and children's programming, respectively. Both of these services were in a rocky financial situation when they were acquired, but their formative concepts showed great promise for alternative programming, and Viacom was prepared to nurture its investment patiently.

Following the lead of Time, Viacom, and others -- most notably, Turner Broadcasting -- the cable industry has developed unique cable programming that offers the public quality alternatives to the network sitcoms and soap operas offered by cable's television competitors, the broadcasters. In effect, the risk Time, Inc. took paid off and changed the nature and mix of television programming.

Since 1975 the cable television industry has proven that television consumers will pay for distinctive, quality programming not offered by the broadcast networks and independents. And in the process cable has created a new economic structure in the world of television. In creating this new structure, cable networks assumed financial risk when success was not assured. In fact, some programmers, such as CBS, tried to develop cable programming networks but failed.

Currently there are 62 cable programming networks distributed nationally and 34 cable programming networks distributed regionally. Twenty-one more networks are in development and should be available to cable consumers in the not-too-distant future. The American public has never before had access to such diversity of viewing choices. And television providers, cable and broadcasters, are in the midst of a vigorous competition for consumer attention. While broadcast networks still get over half of cable television viewers, fifteen years ago, that number was over 98%. As cable invests in new, better, and more diverse programming, we expect this trend to continue.

As noted, however, cable's evolution has been heavily influenced by federal and municipal government regulation.

1. Initial Federal Regulation of the Cable Industry

As cable tried to develop into a full-fledged competitor in the television market, regulatory policies governing cable's activities often lagged far behind and actually constrained progress. The Communications Act of 1934 gave the Federal Communications Commission (FCC or Commission) jurisdiction over interstate communications by wire or radio. Prior to the Cable Act, however, cable proved to be a regulatory conundrum for the Commission. Cable provided television programming to consumers, but did not use the airwaves to do so. This rendered inapplicable any federal licensing scheme based upon the spectrum scarcity rationale that is used by the Commission to support its regulation of broadcast television. On the other hand, cable's use of wire to deliver television programming was not a common carrier transmission service that would allow cable to fit neatly within the FCC's Title II regulatory framework. In other words, the Communications Act of 1934 did not accommodate, or even anticipate, cable television.

Federal regulation of cable began in earnest in the 1960s. In response to cries from broadcasters for protection against potential competition from cable's importation of distant broadcast signals into the service areas of local television broadcast stations, the FCC decided that it had the authority to regulate television programming carried by cable systems as a natural and necessary extension of its authority to regulate broadcast television. In 1966, the Commission found that importation of distant television signals could "destroy or seriously degrade the service offered by a television broadcaster," causing reduction in service to households not served by cable systems. In order to protect local broadcasters, the Commission promulgated rules requiring cable systems to carry the signals of all local stations in their areas, to refrain from duplicating programs of local television stations carried on the system during the same day that such programs were broadcast by local stations, and to limit importation of distant broadcast signals into the service areas of local television broadcasters in the top 100 markets.[1]

Over time, the FCC, in its eagerness to protect broadcasters from competition, even went so far as to prohibit cable from purchasing the rights to display movies that were more than three or less than ten years old. Likewise, a cable operator could be fined if it telecast games involving a sport which had been shown by a broadcast station in the same community within the previous two years. As for syndicated programming, broadcaster exclusivity contracts were permitted to forbid entirely program retransmissions by cable.

The Commission's authority to regulate cable's broadcast signal carriage practices was challenged and eventually affirmed in 1968 by the United States Supreme Court in United States v. Southwestern Cable Company. The Court held that the Commission had jurisdiction under the Communications Act of 1934 to promulgate such regulations, but the Court warned that the Commission's authority was "restricted to that reasonably

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1/ CATV, 2 FCC 2d, 725 (1966).

ancillary to the effective performance of the Commission's various responsibilities for regulation of television broadcasting."[2]

In reaching its decision, the Court found that "CATV systems perform either or both of two functions. First they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae. As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals."[3]

At the time, the use of satellite technology was unheard of in the cable industry, and cable had not yet begun to compete vigorously against broadcasters with alternative, made-for-cable programming. Nevertheless, the Supreme Court's decision in Southwestern had the effect of relegating cable to second-class status in the television industry. Cable would be allowed to grow, but only if the revenues of local broadcasters were protected.

After the Southwestern case, the Commission became deeply involved in the regulation of cable, promulgating rules that covered nearly every facet of the operation of a cable system.

2/ United States v. Southwestern Cable Company, 392 U.S. 157, 178 (1968).

3/ Ibid., at 163.

The courts, however, became increasingly impatient with the Commission's expansion of regulation.

In 1972, a deeply divided Supreme Court returned to the question of federal jurisdiction over cable. At issue were Commission rules which required cable systems with more than 3,500 subscribers to engage in the local origination of programming. The Court could not reach a majority, but Chief Justice Burger, in providing the swing vote to establish a plurality, stated: "Candor requires acknowledgement, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so the basic policies are considered by Congress and not left entirely to the Commission and the courts."[4]

Despite the Chief Justice's warning to the Commission and his plea for congressional resolution of cable issues, cable found itself in a spiral of new and burdensome federal regulations. In addition to the local origination rules, the Commission issued rules requiring all cable operators in the top 100 television markets to: (1) develop a minimum capacity of 20 channels; (2) develop the technical capability for accomplishing

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4/ U.S. v. Midwest Video, 406 U.S. 649, 676 (1972).

two-way, non-voice communications; (3) allocate four separate channels for use by public, educational, local government, and leased access users, with at least one channel reserved for each; and (4) provide production equipment and facilities for public access use. The Commission also regulated the charges that could be imposed on access users.

At last, the Court had had enough. In 1979, in the second Midwest Video case, the Court ruled that access requirements, which could not be imposed on broadcasters, similarly could not be imposed on cable systems. "The Commission may not regulate cable systems as common carriers, just as it may not impose such obligation on television broadcasters. We think the authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress."[5]

2. Initial Municipal Regulation of the Cable Industry

The Court's invalidation of the FCC rules in the second Midwest Video case represents the high water mark of federal regulation of cable television. Unfortunately, it did not represent the beginning of an era of regulatory restraint vis a vis cable. Rather, it represented a point at which municipal, rather than federal, regulation of cable television began its ascendancy.

5/ FCC v. Midwest Video, 440 U.S. 689, 709 (1979).

In 1975, the Commission had announced a program of "deliberately structured dualism" in which state and local public authorities ("franchising authorities") were given responsibility to select cable franchisees, establish franchise boundaries, regulate the construction of cable facilities, and maintain rights of way. Franchising authorities were allowed to regulate rates for basic service. The Commission retained exclusive jurisdiction over all operational aspects of cable systems, including signal carriage and technical standards.[6]

Franchising authorities moved quickly to fill the regulatory vacuum left by the Commission's diminished presence resulting from the Supreme Court's 1979 decision. The increase in local regulatory activities came at a time when many major cities were deciding which cable companies should be awarded initial franchises to construct cable television systems and provide cable television services. During this period local public officials viewed cable, in the words of former New York Mayor John Lindsay, as "an urban oil well." Not only did cities seek to require cable systems to provide a wide range of "community services," but local officials sought to tax cable operators, in the form of franchise fees, thereby providing city governments with a significant new revenue source. The rush of prospective cable operators to wire and serve the cities was used to extract

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6/ Cable Television Report and Order, 36 F.C.C. 2d 207.

valuable and costly services and considerations wholly unrelated to the provision of cable television service.

The litany of excessive demands placed on cable by local governments is a large part of the record before Congress supporting enactment of the Cable Communications Policy Act. Similarly, the not-always-judicious willingness of cable operators to agree to such demands also is part of the record. Neither aspect of this record need be repeated here. It is sufficient to recall that the franchising process had created a situation of over-regulation that demanded payments by cable operators in terms of money, services, and facilities that bore little relation to the marketplace or consumers' interests. Each franchising authority had a different set of rules, a different set of obligations imposed on its cable systems. These rules and obligations were often born more of political incentives to better the achievements of the last city council to grant a franchise than of a carefully-reasoned effort to satisfy consumer demand at the lowest possible cost. Regulatory one-upmanship between cities became the order of the day.

We had come to a situation where the interests of municipal regulators, cable system owners, and potential cable customers differed sharply. Accordingly, in an increasingly competitive market for video distribution, Congress recognized the time had come to set reasonable parameters on municipal regulation in order to allow cable to get on with the business of serving the American television audience.

II. THE CABLE COMMUNICATIONS POLICY ACT OF 1984

In the 97th Congress, Senator Barry Goldwater of Arizona sponsored S. 2172, prototype legislation establishing cable as a part of the national telecommunications policy. This bill was reported from the Senate Commerce Committee in 1982, but Congress adjourned sine die before this legislation could reach the floor. S. 2172 was supported by NCTA and just as vigorously opposed by the National League of Cities (NLC).

1. The Negotiations - The National Cable Television Association and the National League of Cities

Leadership from the Chairmen of the House and Senate Commerce Committees and the Telecommunications Subcommittees, and other members of the House and Senate Committees, brought the NLC and NCTA together into negotiations that resulted in a compromise adopted by the boards of directors of both organizations in March of 1983. This compromise served as the blueprint for the Cable Communications Policy Act of 1984.

The NCTA-NLC negotiations took place against a backdrop of marketplace, regulatory, and judicial events that worked in unique combination to make congressional resolution of cable issues desirable, if not imperative, for both the cable industry and the nation's cities.

For the cable industry, the major incentive was the simple fact of a competitive marketplace: the competition for television viewers' time and attention had become too intense for cable to compete successfully while continuing to drag along all the regulatory burdens imposed on it by municipal governments. City control of rates, program service offerings, and renewal hindered cable operators in their ability to identify and respond to changing consumer demands. City control of basic programming services forced operators to provide programming in complicated and costly multiple tiers; not, as cable customers would have preferred, in a single, attractive package. Uncertainty about renewal also discouraged operator investment in new plant and services. Rate regulation kept the cost of basic service artificially low. This, in turn, forced cable operators to inflate the cost of those services -- premium pay services such as HBO and Showtime -- which, under law, had never been within the jurisdiction of municipal regulators.

In addition to these regulatory constraints, cable faced increasingly intense competitive pressures. Video cassette recorders were becoming as commonplace in homes as television sets and stereos, and Hollywood decreed that video rental stores would be allowed to distribute their movies a full six months before HBO and Showtime could acquire them. At the same time, the FCC was taking steps to preempt and deregulate alternative distribution technologies, such as backyard dishes, MDS, and SMATV.

For the cities, the major incentive to negotiate with NCTA was a desire to preserve the regulatory structure they had created. Pending lawsuits were challenging the cities' right under the First Amendment to grant franchises and their right to regulate cable at all.[7] At the same time the FCC was showing renewed interest in enforcing its preemptive policies.[8]

The Commission had a long-standing rule that franchising authorities could only assess franchise fees in amounts sufficient to offset the costs of regulating and administering the franchise. As a general rule, fees could not exceed three percent of annual gross revenues. Franchising authorities were not allowed to assess higher fees without a specific waiver from the Commission. Waivers for fees of up to five percent were permitted only where a city demonstrated that the actual costs of regulation warranted the additional fees. In addition, cities were forbidden from using franchise fee revenue for any municipal purpose other than administering and regulating the franchise.

Nonetheless, franchising authorities across the country often demanded and received franchise fee payments of five

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7/ The cities' apprehension over these lawsuits was justified a year later when the United States Courts of Appeals for the Ninth Circuit and the D.C. Circuit each found that the First Amendment prohibited cities from limiting franchises so long as pole space for more wires was available. See Preferred Communications v. Los Angeles, 754 F. 2d 1985 (9th Cir. 1985), affirmed, 106 S.ct. 2034 (1986). Telecommunications of Key West, 757 F.2d 1330 (D.C. Cir. 1985). Ultimately, the Supreme Court remanded the Preferred case to the trial court for further development of a record. The constitutional issue raised by the decision of the Ninth Circuit was not addressed by the Supreme Court and the issue remains unresolved to this day.

8/ See discussion infra pages 18 and 33-35.

percent, without complying with the requirement of Commission approval through the waiver process.

This kind of disregard for federal preemption by franchising authorities was not unusual. Franchising authorities could place cable operators between Scylla and Charybdis by forcing the operator either to submit to these demands or to claim protection under federal preemption. By asserting this federal protection, however, cable operators risked retribution in rate regulation, packaging changes, renewal, or any of the other regulatory control commonly exercised by municipalities.

The situation began to shift in 1982 and 1983. The city of Miami demanded from its cable operator a franchise fee of five percent of revenues, plus $200,000 per year in cash for public access, plus in-kind payments for support of access, plus $200,000 per year for the police department's drug education program. The cable operator took the unusual step of bringing the matter to the Commission. The Commission denied the city a waiver and voided all liability for payments over three percent of revenues because the city could not show that the additional money was needed to cover the costs of regulating the franchise.

Because franchise agreements that contravened the preemptive policies of the Commission were common (but after the Commission's decision in the *Miami* case were *ultra vires* and of no effect) cities were anxious to reach an agreement with the cable industry which could be translated into legislation that would preserve the commitments they had obtained.

The boards of directors of NCTA and National League of Cities adopted a comprehensive compromise agreement in the spring of 1983. That compromise covered a broad range of cable-related issues. At its core was agreement on four central points: (1) cable systems subject to effective competition would be deregulated in terms of pricing of basic service and in the programming offered on basic service; (2) franchise renewal proceedings would be subject to federal guidelines, with a right of appeal to the federal courts; (3) cities would retain authority to choose cable franchisees, mandate facilities including access facilities, and collect franchise fees up to five percent without regard to the cost of regulation; and (4) all existing franchise commitments would be preserved unless contrary to an express limitation.

These four basic points formed the nucleus of the NCTA-NLC compromise. Although the dynamic tensions within these two constituent groups called for constant adjustments, the fundamental principles of the compromise held and served as a foundation for the Cable Act.

2. Basic Provisions of the 1984 Act

The Cable Communications Policy Act of 1984 represented a watershed in the history of cable television. The statute established a comprehensive national regulatory scheme designed to ensure that the cable industry would be allowed to develop in an atmosphere free from unnecessary and economically burdensome government regulation.

In reviewing the Cable Act, it is useful to categorize the Act's specific provisions into three general areas: (a) the provisions which allow the cities to continue to regulate cable;

(b) the provisions which were necessary to limit city regulation in order to allow cable to compete in the video marketplace; and (c) the public interest obligations which are unique not only to the Cable Act, but to cable as a major competitor in the video marketplace.

a. Cable Act Provisions Which Allow Continued Municipal Regulation

This section discusses the provisions of the Cable Act that reaffirmed municipal regulation of the cable industry: (1) franchise selection; (2) franchise fees; (3) general municipal regulatory authority; and (4) preservation of existing franchise commitments. As this discussion should make clear, despite widespread perceptions to the contrary, the cable industry continues to be subject to extensive municipal regulation. These are regulations that some of our critics (such as the independent broadcasters and MMDS operators), who allege that cable is "unregulated," would intensely oppose if Congress considered imposing comparable requirements and obligations on them.

(1) Franchise Selection

First, and perhaps most important in this category which affirms municipal regulation of cable, the Cable Act codified the FCC policy of deliberately structured dualism. The Act assured that the selection of a cable system operator and the decision of how many cable franchises would be issued would remain a matter of local regulatory authority.

This provision should be underscored clearly. Many of our critics allege cable is a monopoly because only one franchise exists in most cities. The ability to grant more than one franchise always has been a city's decision, and under the Cable Act, continues to be a city's decision.

Quite frankly, many early franchise awards were made to only one operator because the city required so many commitments that only one franchise would initially be economically viable. Some cities maintain that it is unrealistic to grant more than one franchise, that cable is a natural monopoly, and that competition between two cable systems is not feasible. Whether or not those cities are right, it is a self-fulfilling prophesy. At the time of selecting an initial franchisee, cities had the option of establishing a competitive environment that would encourage market entry by more than one operator. But most cities did not make that choice. Instead, they moved toward requiring elaborate facilities and plant, access facilities and funding, free telecommunications services for local government, and other requirements that cost operators millions and which discouraged market entry by other operators.

Prior to the passage of the Cable Act the ability of municipalities to franchise cable systems was in jeopardy on a number of fronts. In addition to the First Amendment concerns raised in pending lawsuits, another vulnerability faced municipalities in franchising, especially in awarding a single franchise among multiple bidders. This vulnerability flowed from a Supreme Court decision that found municipalities subject to antitrust liability for restraint of trade.[9] One of the concessions of the cable industry in the political understandings that accompanied the cable/cities agreement was acquiesence by the NCTA to antitrust immunity legislation to eliminate damages in municipal antitrust cases which the cities pushed through the 98th Congress[10]. With the Cable Act, Congress provided cities with further insulation from antitrust liability by providing a scheme of regulation for cable franchising that carried at least an implied immunity (Section 621 expressly provides that a franchising authority may award, consistent with the Cable Act, one or more franchises within its jurisdiction).

(2) Franchise Fees

The Cable Act provisions on franchise fees were another of the major gains for the cities and, correspondingly, another of the major concessions by the cable industry. Cities around the country stood to lose millions of dollars each year if the FCC were to become vigorous in enforcing its three percent franchise fee ceiling and preemption. (Recall the discussion earlier about the FCC's ruling on the franchise fee situation in Miami.)

The Cable Act raised the amount of franchise fees a franchising authority can impose on a cable operator during any twelve month period from three percent to five percent, a

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9/ Community Communications Company v. City of Boulder, Colorado, 455 U.S. 40 (1982).

10/ P.L. 98-544.

67% increase over the FCC's rule. Further, the requirement that fees be assessed and disbursed only as necessary to offset the costs of regulation was eliminated. The Act specifically defines the types of payments which are included and excluded in determining the franchise fee, essentially codifying prior FCC rulings. The impact of these franchise fee provisions on city revenues is discussed later in Section IV of this testimony.

The Act allows cable operators and franchising authorities to agree to prepay or defer payment of franchise fees as long as the sum of the fees paid during the term of the franchise does not exceed the amount of money which lawfully could have been collected if the fees had been paid on an annual basis, taking into account the time value of money. This provision essentially grandfathered millions of dollars that had been required as "upfront" payments by some cities, but which were illegal under federal law when they were initially agreed to.

Under the Act, cable operators may pass through to customers any increase in the amount of franchise fees and must pass through to customers any decrease. Cable operators may also itemize the franchise fee separately on customer billings. This seemingly innocuous provision is one of the most pro-consumer provisions in the Act. Franchise fees are, in fact, a tax on cable service. But local control of cable at the time of the Act was so complete that operators typically were forbidden from informing customers that a percentage of their monthly bills didn't pay for cable, but went directly to the local government. Some cities are still uncomfortable with the idea of accepting accountability for this tax and have bargained to keep it hidden.

The purpose of the statutory limit on franchise fees was to put a cap on all assessments, other than general taxes, which a franchising authority could impose on cable systems. The intent of Congress was to codify the concept of franchise fee limits long established in FCC rules.

Prior to the Cable Act, the FCC had long resolved franchise fee disputes under its regulations imposing franchise fee limits. We believe it was the intent of Congress that the FCC should continue to utilize its expertise to resolve such disputes. Immediately following passage of the Cable Act, however, the FCC declared that the Cable Act divested it of jurisdiction over both pending and prospective franchise fee disputes. After a judicial appeal brought by cable operators faced with assessments in excess of the five percent limit, the FCC agreed to render decisions in franchise fee disputes which were pending at the time of passage of the Cable Act.[11]

With respect to post-Cable Act disputes involving additional assessments by cities, the FCC adopted a policy of partial forebearance. The FCC reversed its initial decision and found it had jurisdiction concurrent with the courts over franchise fee disputes, but stated it would exercise such jurisdiction only where such disputes impinge on national policy concerning cable communications and implicate the agency's expertise. The

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11/ Yakima Valley Cablevision v. FCC, 794 F.2d 737 (D.C. Cir. 1986).

appellate court held that, without more express Congressional direction, such forebearance was within the FCC's discretion.[12]

(3) Other Municipal Regulatory Authority

As noted earlier, there is a misconception that has gained wide circulation that with the Cable Communications Policy Act of 1984, Congress totally deregulated the cable industry. Such a misconception, however, does not survive even a cursory inspection of the provisions of the Act.

In addition to the franchise selection and franchise fees powers discussed above, the Cable Act also granted franchising authorities the power to:

- Award or deny renewal of a cable system franchise, subject to federal guidelines;
- Require the construction of cable system facilities, including channel capacity, either as a part of the initial franchise or in the context of a renewal proceeding;
- Require cable systems to provide channel capacity, facilities, and equipment for public, educational, and governmental access use, either during the initial franchising process or during franchise renewal proceedings;
- Establish rules and procedures for the use of channels dedicated for public, educational, and governmental access purposes.
- Prohibit or restrict the offering of programming over channels dedicated for commercial use if, in the judgment of the franchising authority, that programming is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States.

12/ ACLU v. FCC, (D.C. Cir. July 17, 1987).

- Enforce a cable operator's agreement to provide particular facilities and equipment and broad categories of video programming or other services.
- Enforce requirements contained in any franchise prior to enactment for the provision of services, facilities, and equipment, whether or not related to the establishment or operation of a cable system.
- Regulate rates for basic cable service in markets where effective competition does not exist.
- Require and regulate the installation or rental of equipment which facilitates the reception of basic cable service by hearing impaired individuals.
- Assure that the opportunity to purchase cable service will not be denied to any class of citizens because of income or economic status.
- Require customer service requirements of the cable operator in granting a franchise.
- Enact and enforce consumer protection laws consistent with the Cable Act.
- Review the operator's customer service performance in judging a renewal application.

(4) Preservation of Franchise Commitments

The last major concession which the cable industry made in order to strike a compromise with the cities preserved franchise commitments that cable operators had made prior to the Act. This concession is one of the most important, although frequently overlooked, provisions of the 1984 Act.

I have already discussed how the franchise process and its attendant regulatory regimes spun out of control and ignored limitations that had been imposed on franchising authorities through FCC preemption. In addition to exceeding their authority to regulate the operation of cable systems, cities were notorious in demanding commitments from cable operators to finance various and sundry municipal projects wholly unrelated to the provision of cable television service.

Throughout the legislative process that led to passage of the Cable Act, the cable industry, until the very end, was called upon to make concession after concession to dissident cities that wanted to torpedo the agreement. More often than not, the city in question was less concerned about the consequences of the public policy issues under consideration and more concerned that extensive concessions it had obtained from its cable operator might be taken away.

Accordingly, Section 624 and Section 637 of the Act work in tandem to assure cities that cable operators must comply with all of the commitments made at the time they entered the franchise unless they contravene express limitations contained in the Cable Act or fall within the type of commitments that qualify for contract modification under Section 625.

b. Cable Act Provisions Which Allow Cable to Compete in the Video Marketplace

A second major category of elements included in the 1984 Act were provisions designed to give cable the ability to compete effectively for the video consumer. Indeed, one of the express purposes of the Cable Act was to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[13] In order to accomplish this purpose, it was necessary for Congress to establish orderly guidelines for the exercise of federal, state, and local authority with respect to regulation of cable systems. The Cable Act provides jurisdictional allocations, regulatory limitations, and due process guarantees in a number of crucial areas. In this section I will discuss provisions of the 1984 Act that were designed to enable cable to compete. These provisions are: (1) deregulation of basic rates and program service offerings; (2) franchise renewal; and (3) contract modification.

(1) Deregulation of Basic Rates and Program Service Offerings

Probably the most contentious provisions of the Cable Act, both during and after the legislative process, are those provisions which deregulate basic service rates and grant freedom to repackage -- or retier -- programming services. Rate deregulation was a principal feature of Senate and House legislation from the time of introduction to the time of enactment. The specifics of rate deregulation changed, however, as the bills moved through the legislative process. It is important to recall the regulatory situation that existed at the time in order to appreciate fully the evolution of these provisions.

13/ Section 601(b).

(a) Background: Municipal Rate Regulation

The FCC in 1969 limited municipal control of cable rates to must carry signals and public, educational, and governmental (PEG) access channels.[14] The FCC specifically preempted city rate control of any other programming service. Consequently, cities never had jurisdiction to regulate the rates for pay television, including the premium channels, such as Home Box Office, Showtime, the Disney Channel, and other services generally offered to cable customers on an a la carte purchase option. Although the occasional franchise would assert regulatory jurisdiction over premium channels, for the most part cities understood that price control of these premium networks was beyond their jurisdiction.

The problem was somewhat different with respect to another form of pay television, namely the so-called basic cable networks delivered by satellite. These networks are partially advertiser supported and are generally offered by cable operators as a part of the basic service tier. CNN, Headline News, ESPN, USA Network, Arts & Entertainment, Nickelodeon, and other services are examples of these basic cable networks.

Although the FCC's rate preemption policy was intended to encourage the development of such services, the cities took advantage of the fact that cable operators often had adopted a marketing strategy, still popular today, of offering these services for a single package rate. The problem arose when the cities

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14/ First Report and Order FCC Docket 18397, 20 FCC 2d 201 (1969).

claimed regulatory jurisdiction over not just the domain allowed them by the FCC -- must carry and PEG -- but over all programming not offered on a per-program or per-channel basis.

Municipal control over rates often had less to do with reasonable prices for consumers than it had to do with cities using this authority to influence the cable operator. And cities were astonishingly open about this fact. For example, Seattle Mayor Charles Royer, then President of the National League of Cities, in testimony before the House Subcommittee on Telecommunications, Consumer Protections, and Finance, stated unequivocally "In most cities, rate regulation is used as a tool for enforcement."[15]

(b) Legislative History Regarding Rate Deregulation

From the cable industry's perspective, freedom from rate regulation was a necessary and principal objective for legislation if cable was truly to become a competitive part of a national telecommunications picture. Rate deregulation was one of the cornerstones of the NCTA/NLC compromise, and remained so when the parties were expanded to include the U.S. Conference of Mayors.

15/ Statement of Charles Royer, Major of Seattle, Washington, for the National League of Cities, Hearings before the Subcommittee on Telecommunications, Consumer Protections and Finance, Committee on Energy and Commerce, House of Representatives on H.R. 4103 and H.R. 4229, 98th Cong. 1 Sess., serial no. 98-73, May 25, 1983.

(i.) Initial Rate Deregulation by the Senate

Rate deregulation, as passed by the Senate initially in S. 66, was originally slated to occur in markets where four full power television station signals were available (including each of the major networks) and after a transition period of the greater of five years or half the remaining life of the franchise. New systems and renewed systems in markets with four signals were to be deregulated immediately.

As I already have noted, the parameters of rate deregulation under the Cable Act changed as this legislation worked through the Congressional deliberative process. I will, in a moment, discuss in detail how those changes were shaped by decisions of the FCC and the United States Supreme Court. However, it is important to understand that the rate deregulation provisions of S. 66, as passed by the Senate Commerce Committee on April 27, 1983, formed the baseline from which occurred all subsequent changes in both House and Senate rate deregulation provisions.

S. 66, as reported to the Senate by the Committee on Commerce, Science and Transportation, provided: "cable franchises which are in existence on date of enactment and meet the test for rate deregulation; that is, four television signals are present, shall have the deregulation of basic rates deferred for a period of five years or for a period equal to one-half of the remaining term of the franchise, whichever is greater."[16] Again, systems built or renewed

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16/ Senate Report No. 98-67, 98th Cong., 1st Sess., p. 22.

after the effective date would be deregulated immediately.

In the meantime, the bill provided that "any regulated rate may be increased annually by the cable operator by up to five percent or the regional consumer price index (CPI) for the preceding twelve months, whichever is greater."[17] This increase would be automatic, and elective at the option of the cable operator. The franchising authority could not interfere. Further, cable operators were given the discretion automatically to increase rates for basic service beyond the five percent or CPI limit if the operator made a request for an increase and it was not acted upon by the franchising authority within ninety days.[18]

Before adoption of S. 66 by the Senate on June 14, 1983, Senator Lautenberg secured two perfecting amendments. First, the legislation was amended to include a provision that specified that where a system obtained eighty percent subscriber penetration of homes passed, there would be a presumption that adequate off-air reception was not available and local authority to regulate basic service rates would continue.[19]

Second, the provision allowing for an automatic five percent rate increase at the discretion of the cable operator was eliminated, thereby limiting rate increases without municipal

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17/ Ibid.

18/ Ibid.

19/ See Cong. Rec. June 13, 1983, S 8257.

sanction to those which matched the regional CPI increase for the preceding twelve months.[20]

During full Senate consideration of S. 66, Senator Dixon offered an amendment which would have eliminated even this automatic, discretionary increase. The Senate defeated this amendment by a vote of 72 to 26. In doing so, it became clear from the debate -- as it became clear during other portions of the debate -- that the Senate fully intended to provide cable with deregulation of basic rates.[21]

Senator Packwood explained: "All this bill does now, so far as these rates are concerned is simply to say that, one, local cable may have its rates go up no greater than the regional consumer price index, and two, that where they compete in an area where the viewers can receive at least four other over-the-air signals clearly, three of which must be network, there will be no rate regulation." [22]

(ii.) Modification of Deregulation by the House

In the House, the Telecommunications Subcommittee adopted the Senate approach of rate deregulation and the Senate standard of four over-the-air signals for its price deregulation trigger in their bill, H.R. 4103. Prior to consideration of the bill by the full

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20/ Ibid.

21/ cf. Cong. Rec. June 13, 1983 S. 8257-8258; Cong. Rec. June 14, 1983 S. 8305-8306, 8316-8318.

22/ Cong. Rec. June 14, 1983, S. 8314.

House Energy and Commerce Committee, however, two major events occurred to force reconsideration of the terms of rate deregulation.

First, the Commission acted on a petition, filed by the cable operator in Las Vegas, Nevada, who was being prevented by the city from retiering some satellite signals out of his basic service offering. In what came to be known as the "Nevada" decision, the Commission issued a declaratory ruling in which it clarified the extent of its preemptive policies. The FCC said that local franchising authorities, regardless of franchise provisions or contract language, could not prohibit a cable operator from placing distant broadcast stations or satellite-delivered cable programming networks on non-basic service tiers.[23] In other words, under FCC preemption policies, the multiple tier regulation, common at the time throughout the cable industry, was ultra vires and unenforceable by the cities. Cable operators were free to retier all of these program services out of basic packages, as market forces dictated, and reprice them as market forces dictated.

The second major event which shaped the Act's rate deregulation provisions was a Supreme Court decision. Just prior to House Energy and Commerce Committee markup of H.R. 4103, the U.S. Supreme Court handed down its decision in Capital Cities Cable v. Crisp,[24] a case which struck down an Oklahoma statute prohibiting, among other things, cable transmission of out-of-state commercials for beer and

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23/ Community Cable TV, Inc., 95 FCC 2d 1204 (1983), reconsidered 98 FCC 2d 1180 (1984).

24/ 467 U.S. 694 (1984).

wine. The Court affirmed the FCC's plenary jurisdiction over cable. In it's discussion, the court specifically singled out and appeared to affirm the FCC's action in the "Nevada" decision.

In light of the "Nevada" decision and the Crisp ruling, the proposed cable legislation appeared to be more regulatory than the status quo. In response, the full House Energy and Commerce Committee acted to make the Act's deregulatory provisions more compatible with then existing law. Although multiple tier regulation would be allowed to continue during the transition period, that transition period was reduced from five years or half the remaining life of a franchise to a straight four years (ultimately, the transition was reduced to two years.) Similarly, because the FCC's preemptive policy applied to all cities, the Committee decided to increase the number of markets in which deregulation would occur. This issue was extremely sensitive within the city organizations and rather than specify a statutory demarcation line of "effective competition" as less than four signals, the Committee accepted the recommendation of NCTA, the NLC, and the Conference of Mayors to allow the FCC to define those markets where cable is subject to effective competition for basic service. Those cable systems in places meeting the FCC's standard would then qualify for deregulation.

After the original NCTA/NLC compromise was ratified by the respective boards in 1983, it had been necessary for the cable industry to make a continuous string of concessions in order to appease dissident cities and maintain the fragile agreement. Following the "Nevada" case and the Crisp decisions, the pendulum swung the other way, and cities -- fearful of further erosion of their regulatory regimes -- were forced to make last minute concessions to cable to maintain the agreement.

The desire to retain the role of local franchising authorities in regulatory oversight of cable, and fear that the courts and the Commission would further take away such authority, was a principal motivation for many members of Congress voting to adopt the Cable Act. As Congressman Edward Markey, now Chairman of the House Telecommunications Subcommittee, pointed out during the House debate on this legislation:

> "Everyone also should understand that if the House fails to pass a federal cable policy, then our cities will be robbed of their control over cable TV. The era of deregulation, affirmed by the FCC and the Supreme Court, has hit cable regulation with a crippling force.
>
> One result of the deregulation mania is that unless Congress enacts a cable bill, the Supreme Court will do it for us. I can assure you of one thing: the cities and the consumers are not included in the Supreme Court-FCC view of cable policy. Consequently, the question before us is this: will we allow the cities to regulate local cable companies? The question before us is this: will we give consumers the ability to get the services they want at prices they can afford?
>
> In order to be fair to consumers and fair to the cities I believe we must answer those questions yes. We must not abdicate our responsibility and turn cable regulation over to the FCC and the Supreme Court. Instead, we should be bold in our stance in support of the cities and the consumers. We should pass this compromise since it is good for consumers and fair to the cities and the cable industry."[25]

During House consideration of H.R. 4103, it became quite clear that the members considered the compromise negotiated by the National League of Cities, the U.S. Conference of Mayors, and NCTA

25/ Cong. Rec. October 1, 1984, H. 10444.

to be a series of trade-offs in which the primary benefit for cable was total rate deregulation after a two-year transition period. Some may argue that Congress somehow did not really intend to fully deregulate the pricing of cable services. Or, that Congress intended that effective competition criteria would be set so stringently that many cable systems would remain subject to rate regulation. Yet, in the wake of "Nevada" and Crisp, and the NLC/USCM/NCTA 1983 compromise, the legislative debate on H.R. 4103 makes it extremely clear that Congress intended, and understood, that H.R. 4103 would effectively deregulate the pricing of cable services.

As the bill's principal sponsor, then-Congressman Timothy E. Wirth, explained to his colleagues, "[H.R. 4103] deregulates the rates charged for basic cable services in two years, allowing the marketplace to dictate the price for cable programming and services."[26] And later in the debate: "H.R. 4103 as amended before us today reduces the four-year transitional period for municipal rate regulation which was in the bill, to two years. In addition, the bill provides that cable systems which have retiered or repriced cable services in reliance upon the FCC's Nevada decision cannot be required to restore, retier, or replace such services where the change in price or tiering occurred as of September 26, 1984."[27]

26/ Ibid., H. 10436.

27/ Ibid., H. 10436.

Other members were equally clear in their understanding. For example, Congressman John Bryant described the major features of the legislation: "The cities get continued rate regulation for two years and a guaranteed five percent franchise fee. Cable operators, on the other hand, have assurance that they will not be unfairly denied renewal of their franchises and, after the two-year transition period, will be able to set rates to reflect market forces and competition."[28]

Similarly, Mr. Nielson: "Mr. Speaker, I am happy to support the bill...we now have deregulation of the cable industry while at the same time giving additional revenue to the cities and also retaining local rights to control over obscenity."[29]

Mr. Tauzin: "Let me also say that in my own city of New Orleans there is a battle going on between the city council and Cox Cable that is in court today. This bill, as I understand it, would guarantee to the city at least two more years of basic regulation that would not disturb at all the court challenges that are going forward."[30]

The House passed H.R. 4103 on October 1, 1984 and sent it to the Senate. The Senate made a number of amendments, including a provision that made it clear that cable systems already deregulated

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28/ Ibid., H. 10444.

29/ Ibid., H. 10444.

30/ Ibid., H. 10445.

under state law would remain deregulated during the two-year transition period.

As the legislative history specifically points out: "In all other respects, the Senate adopts the House provisions in Section 623 on the deregulation of rates."[31]

With its amendments, the Senate adopted the Cable Act by unanimous consent, after which it was returned to the House and approved by that body.

(c) Section 623 - Regulation of Rates

It is against this historical backdrop that Section 623 of the Cable Act must be assessed.

Section 623 of the Act prohibits government regulation of cable television system rates except where the cable system is not subject to effective competition as defined by the FCC. Where a cable system is not subject to effective competition, rate regulation is limited to the rate charged for basic cable service. However, Section 623 allows franchising authorities in all markets to prohibit discrimination among customers of basic service, and to require or regulate the installation and/or rental of equipment facilitating reception of cable service by hearing impaired individuals.

The Cable Act provided for total rate deregulation in competitive markets after a two year transition period for

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31/ Cong. Rec. October 11, 1984, S. 14285.

franchises in existence at the time of the legislation's enactment. Franchises entered into and renewals granted after enactment in competitive markets were barred from regulation ab initio. In non-competitive markets, however, basic service may continue to be regulated.

Finally, and this is very important, the FCC is required to continue to oversee cable television rates and competition in the marketplace. It must report its findings to Congress by 1990, along with any recommendations for legislative changes. We expect the Commission to begin this process soon. As discussed in Section III, we continue to believe that cable television competes at the local level in a broad video programming marketplace, and that the three station standard remains a sound measure of effective competition.

(d) The FCC Rulemaking to Implement Deregulation

The FCC conducted its rulemaking proceeding to define "effective competition," as instructed by Congress through the Cable Act. Essentially what Congress had posed to the Commission was an economic question answerable by empirical evidence: at what point does the presence of broadcast signals in a market impose a competitive discipline on the price of basic cable service?

Despite the empirically answerable nature of the task assigned to the Commission, most of the comments submitted to the Commission during its rulemaking process were philosophical in nature, with many arguing that cable is a video distribution monopoly (a concept specifically rejected in the Cable Act), while others argued that cable should be regulated because it was subordinate or ancillary to broadcasting (another concept rejected by the Congress in the Cable

Act). NCTA submitted extensive econometric analysis that indicated that the presence of no more than three broadcast stations will serve as a competitive restraint on pricing of basic cable service. No other empirical data was submitted by any party to the proceeding.

Perhaps the most surprising comments came from the National League of Cities. As I have just noted, the FCC's decision in "Nevada" and the Supreme Court's apparent affirmation of that preemption in the Crisp case, led the cities to agree to more immediate and more comprehensive deregulation than that contained in the original S. 66 and in H.R. 4103 as approved by the House Energy and Commerce Committee.[32] The transition period to rate regulation was placed at two years in the statute, and it was the understanding of all parties to the compromise that the definition of effective competition would be limited -- as it always had been -- to the presence of off-air signals and that the requisite number would be something less than four. Despite that fact, the National League of Cities urged the FCC to define effective competition as the presence of five off-air signals, including each of the networks, an independent, and a PBS station, plus the presence of an alternative medium of communications in that system's market that would provide virtually every other programming service offered by the cable

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32/ See discussion of S. 66, which originally set a four station standard, on p. 30-33, and the House Energy and Commerce Committee's decision to set a "less than four" standard, p. 35.

operator. In other words, under the NLC's proposal to the FCC, almost no cable system in America would have been deregulated.

The FCC correctly read the intent of Congress to deregulate basic cable rates in markets where basic cable service is subject to effective competition from broadcasters. In its rules, the Commission defined effective competition to basic cable service as the presence of three unduplicated broadcast signals in a market.

Several parties appealed the FCC's ruling which established the three signal standard. The Court of Appeals for the D.C. Circuit largely upheld the FCC's rate deregulation order and the three signal standard.[33] Several cities asked the Supreme Court for review, but on March 21, 1988, the Court denied certiorari.[34]

The one part of the FCC's rules that was not affirmed by the court, but remanded for further proceeding, deals with how to measure whether the presence of off-air broadcast signals and the manner by which franchising authorities may contest assertions of signal availability by cable operators.

On March 24, 1988, the FCC amended its rules to require that at least three off-air signals must be available in 100% of the community served by the cable system to be considered to face effective competition.

33/ ACLU v. FCC, 323 F.2d 1554 (D.C.Cir. 1987).

34/ Connecticut v. FCC, 108 S. Ct. 1220 (1988).

(e) The Cities' Response to Deregulation

In addition to the cities' effort to rewrite at the Commission the agreement regarding effective competition made during the Cable Act's consideration, some cities have sought to undermine the implementation of rate deregulation.

Since enactment of the Cable Act, some cities have tried to persuade cable operators to "waive" their rights to rate deregulation, but the courts have not permitted such waivers of this federal policy. Moreover, some cities have attempted to argue that rate freeze provisions do not constitute rate regulation under the Cable Act and, thus, prevent even an operator subject to effective competition from raising rates. These strategies, similarly, have been overturned by both state and federal courts.[35]

The other half of price control by cities was program control. Section 623 also allowed cable operators to move programming out of a basic service tier (other than must carry or PEG) only if the tier was not rate regulated. In markets subject to effective competition, of course, this meant only for the transition period, but that was tougher on cable than prior FCC policy, under which cities lacked the authority to require the provisions of program services (other than must carry or PEG) on the basic service tier even if the tier was rate regulated.

35/ See e.g., Town of Westwood v. Adams Russell Company, Inc., 507 N.E.2 763 (Mass App. Ct. 1987). See also, City of Dubuque v. Group W Cable, Inc., Case No. C-85-1046, N.C. Iowa (June 18, 1986).

Later, in Section IV of my statement, I discuss how cable operators and consumers have responded to rate and service deregulation.

(2) Section 626 - Franchise Renewal

In addition to deregulation of rates and services, the Act sets forth standards and procedures in Section 626 governing the renewal of cable franchises. This section is not intended to displace informal negotiations for renewal between cable operators and local franchising authorities. However, the protections of this section may be invoked by either the franchising authority or cable operator to govern the renewal process.

Once invoked, Section 626 requires the franchising authority to commence public proceedings for the purpose of identifying future cable-related needs and interests of the community and to review the performance of the cable operator under the current franchise. Upon completion of these proceedings, the incumbent operator may, on its own initiative, or must, at the request of the franchising authority, submit a renewal proposal which contains such material as the franchising authority requires, including a proposal for an upgrade of the facilities of the cable system. Upon submission of the renewal proposal, the franchising authority has four months either to grant renewal or to issue a preliminary assessment that the franchise should not be renewed. In the event that the franchising authority wishes not to renew the franchise, and upon the request of the cable operator, it must conduct public hearings to consider: (1) whether the operator has substantially complied with the material terms of the existing franchise; (2) whether the quality of the operator's service has been reasonable in light of community needs; (3) whether the operator has the financial, legal, and technical ability to provide the services, facilities and equipment set forth in its renewal proposal; and (4) whether the operator's renewal proposal is reasonable to meet the future cable-related needs and interests of the community, taking into account the cost of meeting such needs and interests.

During this renewal proceeding, the cable operator is entitled to full due process rights, including the right to adequate notice, the right to introduce evidence and compel the production of evidence from others, the right to examine witnesses and the right to a hearing record. The franchising authority must base its decision solely upon the record of the proceeding and must issue a written statement of the reasons for its decision. In the case of a denial, the decision must be based upon the above four standards. However, a franchising authority may not deny renewal of an operator's franchise for failure to comply substantially with the material terms of the existing franchise unless the operator has been given notice of and an opportunity to cure the non-compliance, or if the franchising authority has waived its right to object or has acquiesced in the non-compliance.

Finally, the Act provides standards for judicial review of any proceeding wherein a cable operator's renewal proposal has been denied.

The renewal provisions of the Cable Act have provided an essential stability for cable operators who have provided good service and intend to continue to do so. This stability, which was altogether absent before the Cable Act, changed the incentive of the cable industry from one that must recoup investment within the term of a single franchise, to one with confidence to reinvest in providing better programming, better facilities, and better service to their communities (see Section IV).

(3) Section 625 - Contract Modification

As noted earlier, the Cable Act preserved all provisions of pre-Cable Act franchises, unless they violated limitations of the Act. At the same time, however, Congress took notice of the fast changing competitive conditions confronting cable and built in some latitude, albeit quite limited, for adaptability where necessary.

In addition to all existing contract remedies, the Cable Act established an optional procedure with which cable operators may seek modification of service, facility and equipment commitments. Facility and equipment requirements are to be modified upon a showing of "commercial impracticability," a relatively difficult test. Service commitments, other than public, educational, and governmental access service, may be modified upon a showing by the operator that the mix, quality, and level of service required by the franchise would be maintained.

These provisions have been used to achieve negotiations with franchising authorities who might otherwise have refused to listen. If contract modification negotiations are unsuccessful, the operator may go to court. Very few instances of litigation have occurred. The Court of Appeals for the Fourth Circuit in Tribune v. Montgomery County, Maryland determined that franchising authorities may not impose fines or penalties on a cable operator who is currently seeking relief under the contract modification provision of the Cable Act.[36]

c. Cable Act Provisions Which Set Forth Cable's Public Interest Obligations

The Cable Act stands as a legislative landmark in national communications policy in large part because the cable industry joined with Congress in taking the unprecedented step of recognizing, in federal statute, its public interest obligations. In this section of my testimony, I would like to discuss four specific public interest obligations that the Act spells out for the cable industry: (1) equal employment opportunity; (2) public, educational, and government access (PEG); (3) cable channels for commercial use; and (4) privacy.

(1) Section 634 - Equal Employment Opportunity

Section 634 of the Act prohibits discrimination in employment on the basis of race, color, religion, national origin, age or sex. This section requires cable operators to establish, maintain and execute a continuing program of specific practices designed to ensure equal opportunity in every aspect of their employment policies and practices. The Act directs the FCC to prescribe rules to carry out the intent of Section 634. Additionally, cable

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36/ Tribune United Cable v. Montgomery County, MD. 784 F.2d 1227 (4 Cir. 1986).

operators are required to submit a copy of their EEO policies to the FCC.

The Act also requires operators to file with the FCC, on an annual basis, a statistical report which identifies by race and sex the number of employees in several specified job categories. On the basis of these filings, the FCC annually certifies cable systems to be in compliance with the EEO requirements. No less than once every five years the FCC is required to investigate and review the employment practices of each individual cable operator. The FCC is empowered to impose forfeitures on any cable system which fails to comply with the requirements of the Act. Willful and repeated violation of the EEO provisions also can jeopardize an operator's ability to obtain renewal or transfer ownership of the system.

Mr. Chairman, both you and Senator Hatch, along with Senators Packwood and Goldwater, played a crucial role in formulating this important provision of the Cable Act. No other industry in communications has agreed to a similar, specific statutory obligation. The cable industry recognizes its obligation to pursue equal employment opportunity. We did not oppose inclusion of these provisions in the Cable Act because we believe equal employment opportunity is not an imposition -- it's our responsibility.

(2) Section 611 - Public, Educational and Governmental Access

Under the Cable Act, franchising authorities may, in new or renewed franchises, require that reasonable channel capacity be dedicated for public, education or governmental access channels. The franchising authority must set rules for allowing a cable operator to offer programs over unused PEG channels. However, the cable operator may not exercise control over PEG access programming.

In many communities, PEG access has met and surpassed expectations. In other communities, however, PEG access generally has not been the success that franchising authorities, Congress, and cable operators hoped it would be. In these communities, the public has not participated in local program production and people have not watched public, educational and governmental access channels in any meaningful numbers. And, all too frequently, access groups continue to require substantial amounts of money for studios, facilities and technicians when there is little demand or consumer interest in the programming. While some access programming does attract consumer interest, I believe it is generally fair to say that most access programming does not, and the access requirements of the Act are certainly not cost-free. The fact is that there are numerous cases of franchises granted in the 1980s where the costs of access in payments, equipment and channel capacity directly cost subscribers several dollars per month in their bills.

Access requirements are also beginning to become the subject of litigation and controversy.[37] While there have been a few cases to the contrary, the access requirement has been held to be unconstitutional by a majority of federal court decisions regarding cable franchise provisions.[38] NCTA has not participated in these cases.

(3) Section 612 - Cable Channels for Commercial Use

In addition to channels which must be set aside for public, educational, or governmental use, the Cable Act imposes a federal regulatory regime under which cable operators with 36 or more activated channels must dedicate capacity for commercial use by persons unaffiliated with the cable operator. The Act contains a sliding scale for the number of channels to be set aside based on the operational capacity of the system. Under the Act's provisions, if a person unaffiliated with a cable operator seeks to use a channel for commercial use, the operator is required to establish price, terms, and conditions for such use which are at least sufficient to assure that it will not adversely affect the

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37/ For example, some white supremacist organizations are starting to make use of PEG access. In Kansas City, the franchising authority returned the PEG channels to the operator rather than allow the Ku Klux Klan to use them.

38/ Century Federal v. City of Palo Alto, No. C-85-2168 EFL Slip. Op. (N.D. Cal., Sept., 1987); Group W Cable, Inc. v. City of Santa Cruz 669 F. Supp. 954 (N.D. Cal. 1987). A contrary decision was reached on public access provisions in Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580 (W.D. Pa. 1987).

operation, financial condition, or market development of the cable system.

As with public, educational, and governmental access channels, cable operators are denied by statute any editorial control of the programming carried to their customers on commercial use channels.

To date, very few people have availed themselves of these channels dedicated for commercial use. However, the cable industry is ready to honor its public obligations in this regard if and when the demand emerges.

(4) Section 631 - Privacy

Another of cable's public interest responsibilities recognized in the statute deals with the right of our customers to privacy. These statutory provisions require cable operators to notify their customers when they sign up, and at least once a year thereafter, of the kinds of information the operator collects about his customers and the sort of disclosures the operator may make of that information. The statute also generally prohibits disclosure of personally identifiable information, except under certain circumstances, and requires the cable operator to destroy personally identifiable information if it is no longer necessary for the purpose for which it was collected. Subscribers are given access to information about them and protected in the event such information is the subject of a subpoena.

III. CONTINUING POLICY CHALLENGES

Mr. Chairman, as you and other members of this Subcommittee appreciate, the Cable Act has not put to rest all of the policy debates surrounding the cable industry. Rather, inclusion of cable in the national telecommunications policy has brought into sharper focus the regulatory framework under which providers of video programming compete.

I would like to discuss several policy challenges that to date have not been resolved. These challenges include policy debates over: (1) must carry; (2) ownership patterns in the cable industry -- horizontal concentration and vertical integration; and (3) exclusive rights to video programming.

1. Must Carry

The Cable Act contains a general prohibition on agencies of federal, state, and local government imposing any content restrictions of the programming services offered by cable television. This prohibition contains one notable exception. The Act grandfathered "any rule, regulation, or order issued by any federal law," in effect on September 21, 1983. This exception had one, and only one, purpose -- to grandfather the FCC's must carry rules.

Prior to the Cable Act, the FCC had in effect for some 20 years a complex collection of regulations that required cable systems to give priority, free carriage to all local broadcast signals before providing cable consumers with any other programming service.

a. The Quincy Decision

Two challenges to these must carry rules, however, led to the invalidation of the rules in 1985. One case arose from a situation in Quincy, Washington, a small town located about halfway between Seattle and Spokane, and about 125 miles away from either city. The cable system in Quincy carried the three broadcast network affiliates from Seattle, and the largely duplicative affiliates of the same networks from Spokane. After conducting customer surveys, the cable system, which at the time was a 12 channel system with all 12 channels being used, found that its subscribers wanted to drop the Spokane affiliates and replace them with cable network programming, including Cable News Network. After first trying unsuccessfully to obtain a waiver from the FCC, the system eventually took action to meet its subscribers' demands. The Commission eventually found it was in violation of the must carry rules and the system was fined. It appealed this FCC action to the courts, alleging violations of First and Fifth Amendment rights.

The other case arose from a petition for rulemaking filed by Turner Broadcasting, which asked the FCC to eliminate its must carry rules. Turner documented that the FCC rules were working to keep its services, Cable News Network and Headline News, from getting on cable because the channels were taken up for broadcast signals. Turner believed this to be a constitutionally impermissible situation that preferred one class of speakers -- broadcasters -- over another -- cable programmers, such as Turner.

The two cases were consolidated on appeal. On July 19, 1985, the D.C. Circuit Court of Appeals agreed with the appellants and struck down the FCC's 20-year old must carry regime.[39] In doing so the court found, among other things:

(1) The must carry rules violated the First Amendment rights of cable programmers. The court noted: "Their (the must carry rules) very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage over cable programmers. Under the protective aegis of the rules, local broadcasters are guaranteed the right to convey their messages over the cable system while cable programmers must vie for a proportionately diminished number of channels."[40] After recalling their decision in a case brought a year earlier by the National Association of Broadcasters, that "existing licensees have no entitlement that permits them to deflect competitive pressure from innovative and effective technology,"[41] the court heeded the admonition of the U.S. Supreme Court that "The concept that government may restrict

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39/ Quincy Cable TV v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).

40/ Ibid., at 1451.

41/ National Association of Broadcasters v. FCC, 740 Fed.2d 1190, 1198 (D.C. Cir. 1984).

the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ."[42]

(2) The must carry rules violated the First Amendment rights of cable operators. The court noted that "the rules coerce speech" and found that the injury produced by the rules "stems from the substantial limitations the rules work on the operators' otherwise broad discretion to select the programming it offers to subscribers."[43] The court found the must carry rules to be a constitutionally impermissible intrusion into the cable operators' editorial autonomy and discretion.

(3) The must carry rules violated the First Amendment rights of cable subscribers. In denying the Turner petition, the FCC itself admitted that the rules "compel carriage of broadcast signals in place of alternative programming its subscribers, if given a choice, might otherwise choose." The court took a dim view of this approach. It noted:

> "Indeed, as a matter of established regulatory policy, the Commission considers the desires of cable subscribers to be irrelevant to the application of the rules. This conscious disregard of the subscribers' viewing preferences is difficult, if not impossible, to reconcile with the Supreme Court's repeated admonition that the interests of viewers should be considered 'paramount' in the First Amendment calculus. While, of course, viewers

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42/ Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

43/ Quincy Cable TV v. FCC, supra, at 1452.

> of broadcast television have significant First Amendment interests, we doubt very much that cable subscribers can be left out of the equation entirely."[44]

(4) The must carry rules could not be sustained in the name of preserving "localism" in broadcasting. The court found the rules too inclusive to further the governmental interest because the rules guaranteed carriage to all broadcast stations, regardless of the amount of local programming they actually created and aired.

> "[I]f the goal is to preserve 'localism' and not 'local broadcasters,' the must-carry rules are 'grossly' overinclusive....The 18th station is entitled to carriage no less than the first even if its programming is virtually duplicative of the viewing fare already transmitted over the cable system....It is not the fact of the 18th station that is troubling, but the fact that it is guaranteed a channel even if carriage effectively bumps a cable programmer, regardless of the extent it impinges on the cable operator's editorial autonomy, and irrespective of whether it thwarts viewer preferences. Given the substantial First Amendment costs implicit in this sweeping guarantee, the Commission must make some effort to move beyond the amorphous in defining the interest served by the must-carry rules. Until it establishes a baseline for its general objective of preserving free, community-oriented television -- measured by the number of local broadcast stations in the community, the amount of local programming, or any other criterion within its discretion to choose -- we simply cannot know whether the rules are adequately tailored to pass constitutional muster."[45]

44/ Ibid., at 1453-1454.

45/ Ibid., at 1460-1461.

(5) Without empirical evidence of demonstrable harm to broadcasters resulting from lack of carriage, must carry rules cannot pass First Amendment scrutiny. Throughout the entire opinion, the court criticized the FCC for adopting constitutionally intrusive regulations based solely on conjecture and "intuition" rather than on empirical evidence demonstrating need.

The court went to great pains to point out that it did not find the concept of mandatory carriage so completely hostile to the First Amendment that regulations could not be written which would pass scrutiny under the First Amendment. It did not provide the FCC with substantial guidance, however, on the shape of the First Amendment shoals upon which new must carry rules could founder.

b. The Post-Quincy Compromise

After the Quincy decision, the cable industry took an unprecedented step. Mindful of our public interest responsibilities, of our customers' preferences, and of the political imperatives of Congress, NCTA entered into negotiations with the National Association of Broadcasters, the Television Operators Caucus, and the Association of Independent Television Stations. These negotiations produced a compromise in 1986 in which NCTA agreed to ask the FCC to reimpose specific mandatory signal carriage rules. A copy of the agreement between these principal trade associations, along with an attendant letter of political understandings that was an integral part of the deal, is attached to this testimony. I request that it, too, be printed in the record of these hearings.

Mr. Chairman, I know of no other instance in which courts have freed a particular industry from regulation on constitutional grounds, and that industry has then voluntarily agreed to forego that market freedom and submit to re-regulation. With due deference to my friends in Washington who head these trade associations, I dare suggest that had the Court of Appeals ruled the other way, and found the old must carry rules consistent with the First Amendment, the broadcast community at large would have been no more willing to enter into negotiations to reform those rules to accommodate cable than they were prior to the _Quincy_ decision.

After the compromise was reached, NCTA, NAB, the TOC, and INTV petitioned the Commission to promulgate new mandatory carriage rules based on the agreement of these organizations. The agreement was basically a scaled-down version of the former rules that provided for mandatory carriage of local signals, but which also recognized the First Amendment prerogatives of cable operators and provided them with some editorial discretion over their channels.

Although the specifics of the deal were relatively complicated, they, in essence, provided that any television station within 50 miles of the cable system that could demonstrate a threshold market share would qualify for free, mandatory carriage. This obligation on most cable operators, however, was capped at seven broadcast signals, and operators faced with more than seven qualifying stations were free to choose which seven would be carried and to enter independent arrangements with the others.

c. Channel Positioning and the Post-Quincy Compromise

One of the issues specifically addressed at the bargaining table by NCTA, NAB, INTV, and the TOC dealt with operator discretion over channel designation of qualified broadcast signals carried under the proposed agreement. Since some independent broadcasters continue to raise this matter, I want to provide some background.

Throughout the 20-year history of the FCC must carry rules, local broadcast stations were required to be carried as a part of "basic service" provided to all cable subscribers. The Commission's rules generally required cable operators, on request, to carry a VHF signal on the cable channel with the same number as its broadcast channel. That is, on the number between 2 and 13 assigned to that station by the FCC for its broadcast frequency. For technical reasons, the rules generally did not require "on channel" carriage of UHF stations and allowed cable operators to place UHF stations anywhere within the basic service package.

Because channel positioning was a matter covered by the old must carry rules, it was again addressed by the industry organizations in reaching their recommendation for new must carry rules. The issue was covered in item 11 of the letter, dated February 26, 1986, and signed by Edward O. Fritts, Margita E. White, and Preston Padden, spelling out the inter-industry compromise. This item, which is one of a group of twelve points that reflected everyone's understanding of the compromise, states "Systems are not required to carry stations on their channel positions, but must carry all qualified local stations in their entirety on the lowest priced tier." Thus, the joint industry petition asked the FCC for a new must carry rule which not only allowed continued flexibility as to channel designation for UHF stations, but also agreed to repeal all on channel requirements for VHF stations.

It long has been an article of faith in the broadcasting industry that a UHF license is effectively converted into a VHF license by cable carriage, because the cable retransmission improves and extends the relatively weak UHF signal beyond its normal limitations and because carriage on cable channels 2 through 13 removes the need, inherent in off-air reception of UHFs, for consumers to switch their TV sets to the UHF band. In addition, UHF broadcasters like being carried on low-numbered cable channels because they feel such positioning gives them a competitive advantage over cable programming networks. One hears a lot of talk these days about the necessity to be carried on numbers 2 through 13; anything higher has been called "cable Siberia" by broadcasters seeking not only free carriage, but control of the cable operators' marketing plans and program packages. As one hears this talk, it is important to keep in mind, as I noted earlier, that UHF broadcasters never had a rule through which they could force channel designation, and that the NAB, TOC, INTV and NCTA agreed as a part of their 1986 must carry compromise that the matter would remain within cable operators' discretion.

This issue of channel positioning is difficult for a number of reasons. First, the broadcaster community has not been able to state a neutral principle on which channel positioning could be based. Some want to be carried "on channel," but because of the different technologies of broadcast and cable, some cannot be. For example, where would channel 50 be placed on a 36 channel system? Moreover, those UHF broadcasters with relatively low numbers and their VHF brethren have not advocated the inclusion of high numbered UHF broadcasters in the first 13 channels. They would rather see high numbered UHF stations carried on their FCC assigned channel numbers.

Second, in a world of addressable converters and remote control units, where selecting any particular channel is just as easy as any other, there is no evidence that channel positioning makes a difference.

I discuss our views regarding current proposals dealing with the issue of channel positioning later in this section.

d. The FCC's Second Must-Carry Rules

The FCC, after a long and difficult series of proceedings, largely accepted the inter-industry compromise, with four major revisions. First, special rules were added for public broadcast stations which required carriage of at least one, and in some cases two non-commercial stations without regard to the threshold market share prerequisite of other stations. In effect, public stations were given preferential treatment over commercial stations.

Second, new commercial stations were exempted for one year from the requirement of demonstrating audience share. In other words, such stations were given preferential treatment compared to established commercial stations.

Third, the Commission, sua sponte, required cable operators to offer subscribers an input selection device (an A/B switch) that would allow consumers to flip freely between television reception by cable and over the air broadcast signals. Cable operators were also to conduct an educational campaign to inform consumers of the uses of the input selection device.

Finally, the Commission sunset all regulation but the A/B switch educational requirement after five years.

e. The Century Decision

These new rules were challenged in the D.C. Circuit Court of Appeals by Century Communications, a cable operator with deeply-held convictions about the First Amendment.[46] Century alleged that these new rules, like the old ones, violated their First Amendment rights. In December 1987, the D.C. Circuit Court of Appeals again struck down the must carry rules, finding the record inadequate to justify the new rules in light of the First Amendment rights of cable operators, programmers, and subscribers.

46/ Century Communications, however, is not a member of NCTA.

The court found that the FCC had not demonstrated, either logically or by record, the substantial governmental interests necessary to justify intrusion into cable's First Amendment rights. In the Quincy decision, the court had criticized the FCC repeatedly for its lack of empirical evidence that could be used to argue in favor of perpetuating must carry rules. Once again, with the revised rules, the court found that the Commission lacked empirical data sufficient to sustain the rules.

The court found that a NAB study cited by the Commission, submitted to defend the five year duration of the rules, contained a "melange of disparate facts and findings," and that accepting them "requires an inferential leap of some distance to arrive at a need for five more years of must carry."[47]

The Commission had argued that the five year transitional period was necessary for consumers to adjust (or more accurately readjust) to a world where a television broadcast antenna is necessary. But the court said:

> "We simply cannot accept, without evidence to the contrary, the sluggish profile of the American consumer that the Commission's argument necessarily presupposes. In a culture in which even costly items like the videocassette recorder, the cordless telephone, and the home computer have spread like wildfire, it begs incredulity to simply assume that consumers are so unresponsive that within the span of five years they would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable

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47/ Century Communications v. FCC, 834 F.2d 292, 302 (D.C. Cir. 1987).

> storehouse of new television stations and shows."[48]

The court seemed more persuaded by the NAB study's observation that about half of the survey's respondents were unwilling to predict that they would ultimately purchase what the survey question termed a "special switch." The court believed this "almost certainly reflects merely the present consumer unfamiliarity with the switch and antenna mechanism. To the extent that it does not, it may also reflect consumer disinterest in having access to off-the-air signals."[49]

Finally, the court found it crucial that "the Commission relies heavily on its assumption that in the absence of must carry rules, cable companies would drop local broadcasts. . . During the 16 months that elapsed between Quincy Cable TV and the reimposition of modified must carry rules, cable companies generally did not drop the local broadcast signals that they had been carrying prior to Quincy Cable TV."[50]

Although NCTA filed comments supporting the compromise at the FCC, it was not obliged by the joint industry agreement to defend the constitutionality of the rules and did not attempt to do so, either in its comments to the FCC or in the court proceeding, leaving such efforts to the broadcast industry.

48/ Ibid., at 302.

49/ Ibid., at 302.

50/ Ibid., at 303.

Accordingly, NCTA did not participate in the Century case other than to urge the court not to stay the new ruling pending the appeal.

In the meantime, the court has clarified its decision to state it only struck down the mandatory carriage requirements of the rules. The A/B switch provisions remain.

f. The Impact of Quincy and Century on Signal Carriage

In early 1988, the FCC, at the request of several ranking members of Congress, conducted a survey regarding broadcast station carriage on cable systems in light of the court decisions. Although NCTA urged all cable operators to respond to the FCC's survey, NCTA also registered with the Commission serious concerns about the design and scope of its survey. In particular, the Commission used as its baseline for adherence to a must carry standard the pre-Quincy, pre-1985 rules, rather then the more recent rules that had reflected the inter-industry compromise as an appropriate standard.

In the interest of providing appropriate and accurate data on the carriage of broadcast stations, NCTA commissioned the consulting firm of Price Waterhouse to conduct a broadcast station carriage survey to supplement the FCC's survey. This survey, which was conducted in the summer of 1988, focused on cable system carriage of broadcast stations, as well as carriage changes, relative to the FCC's second set of must carry rules, which were struck down by the court in Century in December 1987.

The 3,966 cable respondents to NCTA's survey serve 32,532,400 subscribers, or over 69% of all U.S. cable subscribers. Because nearly 70% of all cable subscribers are represented in the survey results, it is reasonable to assume that the survey data is representative of cable system carriage of broadcast stations.

Under the post-Quincy must carry rules, which were based on the joint industry agreement, broadcast stations with a threshold audience share and that met the definition of "local" were entitled to carriage, subject to a cap.[51] Of the stations qualified for carriage, Price Waterhouse found that 98% are carried on cable systems today.

The following are the major findings of NCTA's survey:

1. Ninety-seven percent (97%) of the cable systems would still be in compliance with the post-Quincy rules if those rules were still in effect today.
2. Ninety-one percent (91%) of the systems carrying qualified stations reported no repositioning of qualified stations.
3. Eighty percent (80%) of channel repositions reflect stations that were repositioned to cable channels equal to or lower in number than the stations' off-air channel assignments.
4. Eighty-seven percent (87%) of qualified broadcast stations are currently carried on cable channels equal

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51/ See p. 58.

to or lower than the stations' off-air channel assignments.

Thus, the survey results demonstrate that the cable industry in the absence of carriage regulations has continued to carry those stations qualified for carriage under the most recent must carry regulations.

The FCC's results produced somewhat lower numbers for carriage because they used the pre-Quincy rules as a baseline. However, their conclusion -- that the vast majority of local broadcast stations remain carried by local cable systems -- is the same conclusion reached in NCTA's survey.[52]

g. Next Steps Regarding Must Carry

I would again point out that today, even while there are no federal regulations requiring mandatory carriage of local broadcast signals, on virtually every cable system in the country, most local broadcast signals continue to be carried.

However, NCTA continues to be willing to work with the principal representatives of the broadcast industry to produce mandatory carriage rules similar to those which both sides agreed in 1986 are reasonable, this time in statute and with a Congressional mandate. The instant we get the signal from Congress, NCTA will be at the table to develop such legislation,

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52/ FCC, Policy and Rules Division, Mass Media Bureau, "Cable Systems Broadcast Signal Carriage Survey Report," September 1988.

and I have every reason to believe the negotiation need not be protracted.

I note that some members of this Subcommittee have joined Senator DeConcini in the reintroduction of S. 177, the "Cable Compulsory License Non-Discrimination Act of 1989." This legislation tracks a similar bill from the 100th Congress. Under this bill, cable operators would be entitled to a compulsory license for local broadcast stations if they: (1) carry local broadcast stations on the basic service tier in a manner that complies with the post-Quincy rules; and (2) carry each station on the cable channel on which it was carried before the Quincy decision, (or July 19, 1985) or on the channel assigned to such station by the FCC for off-air broadcast, at the election of the broadcast station; or on such other cable channel as may be acceptable to the broadcaster.

I would like to offer several general observations regarding this approach to must carry.

First, I do not believe it is necessary or desirable to tie must carry to the compulsory license. Such an approach dares broadcasters and cable operators in each market to engage in brinksmanship. The amount of local broadcast carriage would be determined ultimately by the competitive strength of a cable operator in a market. What consumers need, I believe, and what the two industries need, is a single, reasonable, and predictable national policy on signal carriage, not a policy which can revolve around the relative strength of each industry in any given market.

On the matter of channel positioning, I would make two observations. First, the legislation seems to reflect the wide difference of opinions within the broadcast industry itself about the importance and impact of channel positioning. Second, the legislation puts this policy principle into the hands of each individual broadcaster. Allowing broadcasters to dictate cable system marketing plans and programming packages by choosing whatever channel position they want, while denying similar rights to cable programmers, has a very familiar ring. It is precisely the constitutional infirmity that forced the Court of Appeals to throw out the must carry rules in both the Quincy and the Century decisions. If those two decisions stand for any proposition in First Amendment law it is this: federal policy and regulation may not favor one class of speakers (broadcasters) over another (cable programmers). I suspect that the Court of Appeals would have the same problems with S. 177 and its channel positioning provisions that it had with previous must carry regimes.

A reasonable, neutral policy on channel positioning, such as mandatory on channel assignment, could be a part of any new must carry law.

2. Vertical Integration and Horizontal Concentration

Next, I would like to discuss two issues -- vertical integration and horizontal concentration -- that may be of particular interest here today.

a. Vertical Integration

In discussing the issue of vertical integration in the cable industry -- that is, the investment by cable operators in cable programming -- it is important that we be very clear about exactly what vertical integration means, particularly from the perspective of television viewers. As I noted earlier, historically the cable industry has had to invest in and create its own programming in order to compete with broadcasters for viewing audience.

Today, cable's investment in its own programming has produced a rich and varied menu for American television consumers. For television viewers, cable's vertical integration means:

- o *Nickelodeon* -- quality programming for children, an audience that commercial broadcasters have basically abandoned.
- o *Black Entertainment Network* -- the only 24-hour national black entertainment network.
- o *C-SPAN and C-SPAN II* -- the cable industry-supported public affairs channels that provide unique coverage of the U.S. Congress, as well as a wide range of public policy-related events.
- o *Bravo* -- a network devoted to award-winning domestic and foreign films and performing arts specials ranging from opera to jazz.
- o *Turner Network Television* (TNT) -- programming devoted to family viewing.

- The Discovery Channel -- an all science and nature documentary channel which was preserved due to cable operator investments.
- Cable News Network (CNN) -- the pioneering all-news network that now sets the standard for news reporting.

In each of these and other instances, the cable industry's vertical integration has provided television viewers with programming choices, choices generally not otherwise available.

Although vertical integration, until the 1930s, had been viewed as primarily harmful to competition, it has become widely accepted in legal, economic, and regulatory circles that vertical integration entails both costs and benefits to competition, and that vertical integration must be judged in terms of its net economic benefit.[53] The costs of vertical integration can be increased market share, which may have the effect of making competitors' market entry or growth of their market shares more difficult. The benefits of vertical integration can be certain efficiencies that can lead to more product at lower cost.

An examination of the cable programming marketplace indicates that vertical integration by the cable industry has not erected barriers to entry by non-operators and that competition among programming services has been enhanced due to the increasing number of networks vying for channel capacity.

53/ See Irwin M. Stelzer and Richard Schmalensee, "Potential Costs and Benefits of Vertical Integration," 52 Antitrust Law Journal, Summer 1983, pp. 249-259.

(1) Programming Options Have Increased

In January 1985, when the Cable Act took effect, there were forty-three satellite-delivered cable programming networks. Today, as the following table demonstrates, there are sixty-two such services, more than a 40% increase over the number in 1985. This figure includes attrition of some cable networks that are no longer in business. There have been forty-four new national networks started up since January 1985, six of these in 1988 alone. In addition, at least twenty-one more services are in various stages of development and should be available to customers in the near future.

(2) Development of Networks Without Cable Operator Investment

As the following table also indicates, of the 117 national, regional, or planned cable networks, 53, or 45%, have or will have no operator ownership involvement whatsoever. Three of the five largest (based on subscription counts) networks -- ESPN, USA Network, and CBN Family Channel -- have no operator investment. And other popular, widely available networks, such as The Disney Channel and The Nashville Network also have no cable operator investment. (Two of these networks, USA and Disney, are owned by movie studios (Universal and Paramount, and Disney) and one, ESPN, by a broadcast network (CapCities/ABC).)

CABLE PROGRAMMING NETWORKS:
NUMBER OF NETWORKS WITH OPERATOR OWNERSHIP/EQUITY
AND WITHOUT OPERATOR OWNERSHIP/EQUITY

	Total Number of Networks	Total Number of Networks With Operator Ownership/Equity	Total Number of Networks With No Operators Ownership
National	62 (100%)	33 (53%)	29 (47%)
Regional	34 (100%)	22 (65%)	12 (35%)
Planned	21 (100%)	9 (43%)	12 (57%)
TOTAL	117 (100%)	64 (55%)	53 (45%)

As the numbers further demonstrate, of the sixty-two nationally delivered cable programming networks, twenty-nine, or 47%, have no ownership affiliation whatsoever with the operating side of the cable industry. Moreover, twelve, or 35%, of the thirty-four regional programming networks function with no operator ownership involvement. In addition, of the twenty-one programming networks that are scheduled to be launched, twelve (or 57%) are proceeding with no plans to attract operator investment.

Further evidence that vertical integration has not foreclosed entry into the programming marketplace is that fact that eleven, or 38%, of the twenty-nine national programming services that have been launched since January 1985, such as FNN/SCORE, have done so with no operator involvement.

In sum, vertical integration has not caused barriers to entry. It has led to tangible benefits for consumers: more programming and better quality. Further, I would note that the entertainment industry generally is characterized by vertical integration. For instance, the top ten Hollywood studios (ranked by box office shares) control 96% of the theatrical film market, 69% of the prerecorded videocassette industry, and 67% of all syndicated television programming. In addition, the top ten Hollywood studios supply 60% of the broadcast network primetime programming, and are primary suppliers to, or owners of, cable program networks. Moreover, the top Hollywood studios have taken major steps toward vertical integration by purchasing 11% of all U.S. movie theater screens, as well as broadcast stations that serve 28% of the total U.S. audience.

b. Horizontal Concentration of Ownership in the Cable Industry

In addition to questions about vertical integration, concerns are being voiced over recent acquisition activities in the industry. However, according to standard measurements of market concentration, the national concentration of cable ownership is low.

The two prevailing measures of market concentration are the top four firm concentration ratio and the Herfindahl-Hirschman Index (HHI). The top four firm concentration ratio simply measures the percentage of the market captured by the four largest companies in that market. The HHI reflects the market share distribution among all firms in the market, giving proportionately greater weight to the market shares of the larger firms. Although the Justice Department has chosen the HHI as the appropriate measure in determining whether or not a market is concentrated, both approaches are used extensively.

The Department of Justice considers concentration a potential problem when the four firm concentration ratio reaches 50%, or when the HHI reaches 1,000.[54]

Current data on market share of cable MSOs show low levels of concentration. Applying the HHI index to the top 20 cable MSOs, the resulting HHI value of 408 falls far below the DOJ's threshold of 1,000.[55] Thus, according to this measure of market concentration, the cable industry is far from being concentrated.

Using the four firm concentration ratio, the conclusion is the same. According to the most recent data available, the top four cable MSOs have attained a 33% share of the cable market, a share far lower than the 50% threshold that defines a

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54/ U.S. Department of Justice Merger Guidelines, p. 18. Note that the HHI threshold of 1,000 is a minimum level of concentration. The maximum HHI level attainable is 10,000, which represents a pure monopoly situation (one firm with 100 percent of the market = 100 x 100).

55/ In its guidelines, the DOJ states that although it is desirable to include all market firms, small fringe firms do not affect the HHI significantly and are therefore not critical. Only the top 20 MSOs were used here because beyond the 20th largest MSOs, each smaller MSO captures less than one percent of the market, and thus the square of a number less than one will have little impact on the value of the index. The top 20 MSOs serve approximately 31 million subscribers, or about 64% of the nation's subscribers.

concentrated market.[56]

3. Programming Exclusivity

A lot of discussion has been devoted since deregulation to the question of "competition" to cable television systems. Much of this discussion has generated more heat than light.

As I have described, competition in the distribution of video programming is intra-market and inter-modal.

As I described in detail earlier, the cable television industry was largely an extension of the broadcast television industry until the late 1970s. Cable was little more than a retransmission service for broadcasters, providing a quality picture where the ability to receive that same signal over-the-air was not as optimal. Cable did not become a competitor in the video marketplace, in any meaningful sense of the word, until it began to develop programming alternatives to the fare available from broadcast stations.

There can be little disagreement that CNN and Headline News compete directly with the broadcast networks' news operations, that Arts and Entertainment and The Discovery Channel compete

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56/ Both of these concentration numbers were computed assuming the Time-Warner merger has been completed. These figures also include Tele-Communications Inc., which owns systems serving 6,363,998 subscribers. TCI also has minority ownership interests (less than 50%) in systems serving an additional 4,962,675 subscribers. If all of these systems are included, the top four firms would own systems serving 43% of total industry subscribers, still below the threshold for concern, and the HHI would be 766.

against programming typically found on PBS, that ESPN competes against sports programming carried by broadcasters, and so on. Further, cable has found it highly effective to compete against broadcasters by serving market segments ignored by television stations. Black Entertainment Television, the children's programming network, Nickelodeon, and Spanish-language networks allow cable operators to compete against local broadcasters by serving interests in the community the latter largely has ignored or abandoned.

a. Exclusivity and Federal Law

NCTA recognizes that competition thrives most vigorously in a market where programmers retain discretion to dtermine how and by whom their products are to be exhibited.

Federal law has long recognized that protecting exclusive rights to intellectual property both promotes competition and provides for increased diversity of information and entertainment choices. And, federal policy has recognized that disruption of these exclusive rights works against, and not toward, competition.

Federal law, for example, does not mandate that a local movie theater or even a national chain of theaters is entitled to show any particular movie.

Federal law does not mandate that all of the television stations are entitled to network affiliation agreements. Federal law does not permit a cable system to use its compulsory license to import network programming over the objection of a local affiliate of that network.

Last month, the federal government took steps to further strengthen broadcasters' rights to exclusivity over programming. On March 21, 1989, the FCC issued an order which will reinstate syndicated exclusivity for broadcasters, so that federal law will, therefore, not permit cable to use its compulsory license to import programming from distant stations if a local station has the complete rights to a market for such programming. At the same time, the FCC broadened the network non-duplication rules by, among other things, expanding the situations where local broadcast network affiliates can prevent carriage of distant broadcast network affiliates.

It must be noted that NCTA believes this particular set of rules, as fashioned by the Commission, will be largely unworkable for cable operators and a disaster for consumers. These particular rules will confuse, frustrate, and anger consumers when popular programs and out-of-town stations are dropped. NCTA opposed the imposition of these rules when the FCC began its proceedings in 1987 and we continue to believe these rules are anti-consumer. Notwithstanding our strong and consisent opposition, however, NCTA has decided not to protract the dispute further. It should also be noted that NCTA detected no real support in Congress to challenge these rules. Accordingly, the Board of Directors of NCTA voted April 6, 1989, to refrain from joining appeals to the D.C. Circuit to invalidate the FCC's new syndicated exclusivity rules.

Just last year, Congress recognized the need to protect exclusivity in the Satellite Home Viewer Act of 1988. That law extends a compulsory license to satellite carriers to make broadcast signals available to home satellite dish owners. Congress restricted that license, however, so that home dish owners may not receive network programming via satellite if they have access to a terrestrial broadcast affiliate of that network. The law also ordered the FCC to see if similar protection for non-network programming is feasible.

Cable is proud of the competitiveness it has brought to the video marketplace. In 1972, network audience share was 98%. In 1988, it was closer to 60%. This change in audience share is due largely to competitive programming alternatives provided by cable television and independent broadcasters.

b. Exclusivity and "Competing" Technologies

Some satellite dish dealers and some MMDS operators, who have seen the rising popularity of cable programming, are now maintaining that they would like to "compete" with cable by selling cable network programming. This, of course, comes after cable networks and cable operators have taken all of the risk to develop their programming and establish brand name identity for it. Some groups have come to Congress and asked that cable networks be stripped of their ability to determine how to distribute their own programming.

It is important to remember that there is absolutely no legal impediment to any entrepreneur or any industry that wishes to create or obtain programming exclusively for itself. And it is important to remember tnat these proponents of "competition" are not proposing to expand the diversity of programming options in the marketplace and provide consumers with more choices for entertainment and information.

Neither satellite video delivery or MMDS video delivery is subject to local regulation or accountability. Both have been deregulated by the FCC. Neither is obliged to pay 5% of gross revenues in franchise fees to the cities they operate in. Neither is obliged to make public service expenditures like cable operators do to establish and maintain public access channels and access studios. Even though neither has any local obligation, both want the federal government to give them special treatment and legislate distribution contracts for the programming cable has already purchased, rather than purchase their own programming and risk their own investment in order to truly compete.

c. Availability of Cable Programming Networks to MMDS Systems and Home Satellite Dishes

Some MMDS operators and satellite dish dealers have alleged that vertical integration in the cable industry has forced cable networks to withhold programming from their technologies. While some individuals may not have distribution contracts for particular networks they might wish to sell, the following summary demonstrates that cable networks are generally available to MMDS systems and the dish community.

Currently, a total of 30[57] cable program services are carried by MMDS systems.[58] Contrary to the claims of the MMDS interests, then, MMDS systems do offer their subscribers program services which are among the highest-rated and most popular cable networks available, including ESPN, Superstation TBS, HBO, CNN, Nickelodeon, Lifetime, and MTV.

For home satellite dish owners, every cable network that is scrambled is available to dish owners, either directly from the networks themselves, or from a number of intermediary vendors.

57/ These 30 cable networks include three program services (Video Hits One, C-SPAN II, and Financial News Network) which are expected to receive carriage on MMDS systems in the spring and summer of this year.

58/ In addition to these 30 cable networks, MMDS operators carry other programming services such as the superstations WWOR, WGN, and WPIX and non-cable program networks such as Starion. The majority of MMDS systems currently have limited channel capacities, typically consisting of four to eight channels (a maximum of 33 channels is possible).

Satellite Programming Currently Carried
by MMDS Systems and HSD Distributors

PROGRAMMING NETWORK	MMDS SYSTEM	HSD DISTRIBUTOR
American Movie Classics	People's Choice (Milwaukee, WI) Capital Wireless Corporation	United TVRO Showtime Satellite Network Programmers Warehouse ** The Satellite Source ** Netlink USA
Arts & Entertainment (A&E)	Capital Wireless Corporation Wireless Cable of Greater Washington*	Unscrambled; available free-of-charge
Black Entertainment Television	MetroTen Wireless Cable of Greater Washington*	Unscrambled; available free-of-charge
CBN Family Channel	Wireless Cable of Michigan TV3 Rural TV Systems (Deming, NM) Rural TV Systems (Silver City, NM) MetroTen Family Entertainment Television Capital Wireless Corporation Rural TV Systems (Las Cruces, NM) People's Choice (Houston, TX)	Tempo Turner Cable Network Sales United TVRO National Programming Service ** Programmers Warehouse ** The Satellite Source ** National Rural Telecommunications Cooperative ** HBO Showtime Satellite Networks Superstar Connection
CNN	Family Entertainment Television TV Communications Network Capital Wireless Corporation Rural TV System (Las Cruces, NM) People's Choice (Sacramento, CA) Wireless Cable of Greater Washington*	National Programming Service ** Programmers Warehouse ** The Satellite Source ** National Rural Telecommunications Cooperative ** HBO Netlink USA Turner Cable Network Sales United TVRO
CNN/Headline	Wireless Cable of Michigan People's Choice (St. Louis, MO) MetroTen TeleCable of Puerto Rico People's Choice (Milwaukee, WI) People's Choice (Tucson, AZ) AT&I (Mobile, AL) *** AT&I (San Luis Obispo, CA) *** AT&I (Salina, KS) ***	National Programming Service ** Programmers Warehouse ** The Satellite Source ** National Rural Telecommunications Cooperative ** HBO Netlink USA Turner Cable Network Sales United TVRO
C-SPAN	MetroTen Capital Wireless Corporation Wireless Cable of Greater Washington*	Unscrambled; available free-of-charge
C-SPAN II	Wireless Cable of Greater Washington *	Unscrambled; available free-of-charge

PROGRAMMING NETWORK	MMDS SYSTEM	HSD DISTRIBUTOR
Cinemax		National Programming Service ** Programmers Warehouse ** National Rural Telecommunications Cooperative ** HBO Netlink USA Turner Cable Network Sales
Country Music TV		Unscrambled; available free-of-charge National Rural Telecommunications Cooperative **
Discovery Channel	TV3 MetroTen Wireless Cable of New York TeleCable of Puerto Rico Capital Wireless Corporation People's Choice (Sacramento, CA) * TV Communications Network * Wireless Cable of Greater Washington*	The Satellite Source ** Programmers Warehouse ** National Rural Telecommunications Cooperative ** Showtime Satellite Networks United TVRO Unscrambled; available free-of-charge
Disney Channel	MetroTen Wireless Cable of New York TeleCable of Puerto Rico Capital Wireless Corporation People's Choice (Houston, TX) Wireless Cable of Greater Washington*	National Rural Telecommunications Cooperative ** Netlink USA Disney
ESPN	People's Choice (St. Louis, MO) MetroTen Wireless Cable of New York TeleCable of Puerto Rico Family Entertainment Television People's Choice (Milwaukee, WI) People's Choice (Houston, TX) People's Choice (Tuscon, AZ) Wireless Cable of Greater Washington	National Programming Service ** Programmers Warehouse ** The Satellite Source ** National Rural Telecommunications Cooperative ** HBO Netlink USA Showtime Satellite Networks United TVRO
Exxtasy		National Programming Service **
FNN	Wireless Cable of Greater Washington *	Programmers Warehouse ** The Satellite Source ** Showtime Satellite Networks United TVRO Unscrambled; available free-of-charge
FNN/Score	Capital Wireless Corporation	Programmers Warehouse ** The Satellite Source ** Showtime Satellite Networks United TVRO Unscrambled; available free-of-charge

PROGRAMMING NETWORK	MMDS SYSTEM	HSD DISTRIBUTOR
HBO	Wireless Cable of Greater Washington Wireless Cable of Michigan Wireless Cable of New York People's Choice (Milwaukee, WI) People's Choice (Tucson, AZ)	National Programming Service ** The Satellite Source ** National Rural Telecommunications Cooperative ** HBO Netlink USA Turner Cable Network Sales
Home Team Sports (Regional Sports Network)	Wireless Cable of Greater Washington	Programmers Warehouse **
Home Sports Entertainment (Regional Sports Network)		National Rural Telecommunications Cooperative **
KCNC (NBC / Denver, CO)		Programmers Warehouse ** The Satellite Source ** National Rural Telecommunications Cooperative ** Netlink USA
KDVR (Independent / Denver, CO)		Programmers Warehouse ** The Satellite Source ** National Rural Telecommunications Cooperative ** Netlink USA
KMGH (CBS / Denver, CO)		Programmers Warehouse ** The Satellite Source ** National Rural Telecommunications Cooperative ** Netlink USA
KRMA (Educational / Denver, CO)		Programmers Warehouse ** The Satellite Source ** National Rural Telecommunications Cooperative ** Netlink USA
KTVT (Independent / Dallas, TX)	TV5 *	Programmers Warehouse ** National Programming Service ** The Satellite Source ** National Rural Telecommunications Cooperative ** Netlink USA Superstar Connection United TVRO
KTLA (Independent / Los Angeles, CA)	TV5 *	National Programming Service ** The Satellite Source ** Programmers Warehouse ** National Rural Telecommunications Cooperative ** HBO Netlink USA Superstar Connection United TVRO Tempo
KUSA (ABC / Denver, CO)		Programmers Warehouse ** The Satellite Source ** National Rural Telecommunications Cooperative ** Netlink USA

PROGRAMMING NETWORK	MMDS SYSTEM	HSD DISTRIBUTOR
KWGN (Independent / Denver, CO)		Programmers Warehouse ** The Satellite Source ** National Rural Telecommunications Cooperative ** Netlink USA
Learning Channel	Wireless Cable of New York People's Choice (Milwaukee, WI) TV Communications Network *	The Satellite Source ** Programmers Warehouse ** National Rural Telecommunications Cooperative ** Showtime Satellite Networks United TVRO Unscrambled; available free-of-charge
Lifetime	Capital Wireless Corporation People's Choice (Sacramento, CA) * Wireless Cable of Greater Washington*	National Programming Service ** The Satellite Source ** Programmers Warehouse ** National Rural Telecommunications Cooperative ** HBO Netlink USA Showtime Satellite Networks Superstar Connection Tempo United TVRO
Madison Square Garden Network (Regional Sports Network)	Wireless Cable of New York	Unscrambled; available free-of-charge
MTV	Wireless Cable of Michigan MetroTen Wireless Cable of New York TeleCable of Puerto Rico People's Choice (Milwaukee, WI) Capital Wireless Corporation Rural TV Systems (Las Cruces, NM) Wireless Cable of Greater Washington*	The Satellite Source ** Programmers Warehouse ** Showtime Satellite Networks United TVRO
Nashville Network (TNN)	Rural TV Systems (Deming, NM) MetroTen Family Entertainment Television Rural TV Systems (Las Crusces, NM) People's Choice (Houston, TX)	The Satellite Source ** Programmers Warehouse ** Snowtime Satellite Networks United TVRO
Nickelodeon	MetroTen Wireless Cable of New York TeleCable of Puerto Rico Family Entertainment Television Capital Wireless Corporation Rural TV Systems (Las Cruces, NM) People's Choice (Sacramento, CA) Wireless Cable of Greater Washington*	The Satellite Source ** Programmers Warehouse ** National Rural Telecommunications Cooperative ** Showtime Satellite Networks United TVRO
Nostalgia		National Rural Telecommunications Cooperative ** Unscrambled; available free-of-charge

PROGRAMMING NETWORK	MMDS SYSTEM	HSD DISTRIBUTOR
Playboy Channel	Wireless Cable of New York People's Choice (Milwaukee, WI)	Showtime Satellite Networks
Satellite Sports Network		National Programming Service ** National Rural Telecommunications Cooperative ** Superstar Connection
Showtime	MetroTen Wireless Cable of New York People's Choice (Milwuakee, WI) People's Choice (Houston, TX) People's Choice (Tucson, AZ) Wireless Cable of Greater Washington	Programmers Warehouse ** The Satellite Source ** Netlink USA Showtime Satellite Networks
SportsChannel America	MetroTen	Florida and Northeast feeds are unscrambled; available free-of-charge
Stardust Theater		National Programming Service ** Stardust Theatre** The Satellite Source ** Programmers Warehouse ** National Rural Telecommunications Cooperative **
Starion Premier Cinema	People's Choice (St. Louis, MO) TV3 Rural TV Systems (Silver City, NM) Family Entertainment Television Capital Wireless Corporation Rural TV Systems (Las Curces, NM) TV5 * People's Choice (Sacramento, CA) TV Communicaitons Network * People's Choice (Tucson, AZ) People's Choice (Houston, TX)	National Programming Service ** National Rural Telecommunications Cooperative ** Superstar Connection Starion
Superstation TBS	Wireless Cable of Michigan People's Choice (St. Louis, MO) TV3 Rural TV Systems (Deming, NM) Rural TV Systems (Silver City, NM) MetroTen Wireless Cable of New York TeleCable of Puerto Rico Family Entertainment Television People's Choice (Milwaukee, WI) TV Communications Network Capital Wireless Corporation Rural TV Systems (Las Cruces, NM) People's Choice (Houston, TX) People's Choice (Tucson, AZ) AT&I (Salina, KS) *** AT&I (San Luis Obispo, CA) *** AT&I (Mobile, AL) *** Wireless Cable of Greater Washington*	National Programming Service ** Programmers Warehouse ** National Rural Telecommunications Cooperative ** Tempo United TVRO

PROGRAMMING NETWORK	MMDS SYSTEM	HSD DISTRIBUTOR
The Movie Channel	People's Choice (Tucson, AZ)	Programmers Warehouse ** The Satellite Source ** Netlink USA Showtime Satellite Networks
TNT		Turner Cable Network Sales
Travel Channel	Capital Wireless Corporation	National Rural Telecommunications Cooperative ** Unscrambled; available free-of-charge
USA Network	MetroTen Wireless Cable of New York Capital Wireless Corporation Rural TV Systems (Las Cruces, NM) People's Choice (Sacramento, CA) People's Choice (Houston, TX) Wireless Cable of Greater Washington*	National Programming Service ** Programmers Warehouse ** HBO Netlink USA Showtime Satellite Networks United TVRO
Univision	MetroTen	Unscrambled; available free-of-charge
VH-1	People's Choice (Sacramento, CA) *	The Satellite Source ** Programmers Warehouse ** Showtime Satellite Networks United TVRO
WABC (ABC / New York, NY)	TeleCable of Puerto Rico	National Programming Service ** National Rural Telecommunications Cooperative ** HBO Primetime 24 **
WBBM (CBS / Chicago, IL)	TeleCable of Puerto Rico	National Programming Service ** National Rural Telecommunications Cooperative ** HBO Primetime 24 **
WGN (Independent / Chicago, IL)	People's Choice (St. Louis, MO) TV3 Rural TV Systems (Deming, NM) Rural TV Systems (Silver City, NM) MetroTen TeleCable of Puerto Rico Family Entertainment Network People's Choice (Milwaukee, WI) TV5 * TV Communications Network * People's Choice (Houston, TX) People's Choice (Tucson, AZ) AT&I (Salina, KS) *** AT&I (San Luis Obispo, CA) *** AT&I (Mobile, AL) *** Wireless Cable of Greater Washington*	National Programming Service ** Programmers Warehouse ** The Satellite Source ** National Rural Telecommunications Cooperative ** Superstar Connection United TVRO Netlink USA

PROGRAMMING NETWORK	MMDS SYSTEM	HSD DISTRIBUTOR
WPIX (Independent / New York, NY)	TeleCable of Puerto Rico	Superstar Connection United TVRO
WSBK (Independent / Boston, MA)	TV Communications Network *	National Programming Service ** Programmers Warehouse ** The Satellite Source ** National Rural Telecommunications Cooperative ** HBO Netlink USA Superstar Connection Tempo United TVRO
WWOR (Independent / New York, NY)	Rural TV Systems (Deming, NM) Rural TV Systems (Silver City, NM) MetroTen TeleCable of Puerto Rico People's Choice (Milwaukee, WI) TV Communications Network Capital Wireless Corporation People's Choice (Houston, TX) Wireless Cable of Greater Washington*	National Programming Service ** Programmers Warehouse ** The Satellite Source ** National Rural Telecommunications Cooperative ** HBO Netlink USA Superstar Connection Tempo
WXIA (NBC / Atlanta, GA)	TeleCable of Puerto Rico	National Programming Service ** National Rural Telecommunications Cooperative ** HBO Primetime 24 **
Weather Channel		National Rural Telecommunications Cooperative ** The Satellite Source ** Programmers Warehouse ** HBO Turner Cable Network Sales United TVRO Showtime Satellite Networks Netlink USA Superstar Connection Tempo

* These MMDS systems have been licensed to carry the program networks noted, although the channel or system launch dates are scheduled for later in 1989.

** These third-party distributors are not affiliated with the cable industry.

*** AT&I's systems have been temporarily shutdown to prepare for planned increases in the systems' channel capacities. The program services indicated had been carried on the AT&I systems before they went off the air in late 1988 and early 1989. These systems are expected to be transmitting again in July, although we could not confirm if these program services will continue to be carried.

NOTE: For MMDS systems, not all networks are carried in all locations within the systems' service areas.

4. Competition On The Local Level

Many of cable's critics (chief among them, cable's real and would-be competitors) have tried to focus the attention of Congress on recent price increases for basic service, without noting the dramatic strides cable has made since deregulation in both quality and quantity of programming on basic service. The superficial and simplistic analyses of these critics tend to dwell on anecdotal recitations of basic service price increases and further tend to express them not in terms of real dollars, but in terms of percentages. The conclusion they then draw is the one that they were looking for: that deregulated cable systems are not subject to effective competition. I submit that exactly the opposite is true.

As I noted earlier, competition in the distribution of video programming is intramarket and intermodal. That is, the relevant product market -- video programming -- is characterized by competition between different distribution media within a discreet geographic territory, usually a single community or metropolitan area.

Although most communities in America have but a single cable system, just as most communities have a single daily newspaper, consumers in those communities have access to video programming from a variety of other distribution systems.

Using the Cable Act as a benchmark, it is evident that both cable and its competitors have experienced impressive growth. There are now more than 1,300 broadcast stations on the air, over

200 more than there were in 1984.[59] In 1984, there were 15.5 million VCR's in homes across the country.[60] Last year that rose to 53.4 million.[61] VCR penetration since 1984 caught and passed cable penetration. In 1984 there were less than 796,000 satellite dishes.[62] Today there are almost 2.5 million.[63] In 1984 there were 16,700 indoor theater screens.[64] By the end of 1987, the last year for which we have numbers, there were 22,900.[65]

Mr. Chairman, I submit that this review shows that the market for video distribution is healthy and vigorously competitive. Wny, then, all the clamor about the lack of effective competition for cable?

What we are witnessing in the marketplace today is the evolution of cable television as an effective competitor. Deregulation, more than anything else, is responsible for that. The question properly framed, it seems to me, is not whether

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59/ 1988 Television and Cable Factbook, Cable Services Volume, p. C-299.

60/ Ibid, p. C-300.

61/ A.C. Nielson Co., July 1988.

62/ Kagan Associates, "Marketing New Media," February 28, 1987, p. 1.

63/ "Satellite TV: Facts At A Glance," Satellite Broadcasting and Communications Association, November 1988.

64/ U.S. Industrial Outlook, 1985.

65/ Ibid., 1988.

price increases have occurred -- they have. The proper question is whether consumers believe they realize good value for their purchase. Consumers are telling us overwhelmingly -- they do.

The fact that cable subscribers believe they receive great value from cable is not just self-promotion by the industry. You do not have to take our word for it. Take the word of our biggest competitors, the broadcasters.

For the past sixteen years, the Television Information Office has commissioned the Roper Organization to survey the public's attitudes toward television. This year, for the first time, Roper asked people to compare cable with network television. The only category of programs in which the networks scored better than cable was news. Cable got better marks than network television for sports, cultural, and educational programming, and overall quality.

As I have already have noted, average basic subscribers now receive about 35 channels for $0.49 per day. That is 35 channels of continuous news, entertainment, and information, 24 hours a day for less than the price of one copy of USA Today. It costs less per day to subscribe to basic cable service than it costs to go across town on the Metro system. For that $0.49 per day, as the Roper poll points out, consumers are getting the best in television.

This increase in quality and in value is the primary reason why basic cable subscriptions are up and churn is down. In short, basic cable prices have risen since deregulation, but it is a price for a much bigger and better product. Our customers are telling us, and telling the broadcasters, what they prefer.

IV. TRENDS AND DEVELOPMENTS SINCE ENACTMENT OF THE CABLE COMMUNICATIONS ACT

Mr. Chairman, I have devoted substantial discussion to how regulatory issues raised during the Cable Act, and since, have been worked out, or are being worked out. When it comes time for you to grade the cable industry since deregulation, however, NCTA believes that the principal question which should be addressed is: how effectively are the interests of American television viewers being served? In this regard, I think you will find the changes brought by the Act have produced, and will continue to produce, extremely positive benefits for cable customers.

In summary:

- Rates for basic services have increased, as the Act contemplated, but these increases have been accompanied by decreases in premium service rates. The net result has been generally reasonable and responsible rate increases, contrary to the exaggerated claims of our critics.

- The basic structure of program service offerings has been significantly simplified for consumers, as various program tiers have been consolidated.

- The cable industry's investment in new plant and renovation of existing plant has led to expanded channel capacity and the introduction of new technologies, such as pay-per-view. In addition, the last remaining cities to be wired for cable are now being wired.

- Cable has become a more effective competitor.
- Growing cable subscriptions have helped to increase the franchise fees for cities, providing an important, unrestricted revenue source for city governments.
- Finally, substantial new investments have been made in cable programming, providing more choice, more diversity, more quality, and more competition than ever before.

I will discuss each of these developments directly in the following section.

1. Rates and Program Service Offerings

Basic service rates have not skyrocketed, despite random anecdotal evidence some claim demonstrates a national pattern. Rates for premium programming actually have come down and "churn," the subscriber disconnect rate that is perhaps the greatest measure of customer satisfaction, is down.

On December 29, 1986, the two year transition to rate and packaging deregulation concluded, and cable operators were free, for the first time, to offer basic cable service subject to market forces rather than local government regulation.

Basic service tiers usually contain, among other channels, local broadcast stations plus satellite delivered cable channels such as C-SPAN, Cable News Network, and ESPN. Until deregulation, the cost and composition of basic service tiers was regulated in many markets.

As one industry analyst noted, "[w]ith basic rates held down artificially by local rate regulation, cable operators lacked freedom to package their services and often had to rely on increases in pay rates to improve the bottom line."[66]

An examination of historical industry-wide basic service prices clearly indicates that cable operators were, under regulation, pricing their services at artificially low levels. From 1976 to 1986, for example, average industry-wide basic cable rates increased by an estimated 65%,[67] a level of increase that was far below the 93% increase in overall consumer prices over the same time period.[68]

66/ Paul Kagan Associates, Inc., Cable TV Franchising, June 14, 1985, p.2.

67/ In 1976, the average basic monthly rate was $6.72. By 1986, the average basic monthly rate was $11.09. Paul Kagan Associates, Inc., The Pay TV Newsletter, May 30, 1986, p. 4; 1986 estimate, Cable TV Investor, November 29, 1988, p. 9.

68/ In 1976, the annual average Consumer Price Index (All Items) was 170.5. In 1986, the annual average CPI was 328.4. U.S. Bureau of Labor Statistics, Handbook of Labor Statistics, annual.

a. Pricing Changes Since Deregulation: Looking at the Customer's Overall Monthly Bill

The data available on cable service pricing changes since deregulation indicates that while basic service prices have increased, premium network prices have either decreased or remained unchanged,[69] the number of channels customers receive has been expanded, and channel line-ups have been redesigned to better reflect the demands of customers.[70] Thus, given these varied changes, the most appropriate measure of cable price changes is the overall monthly bill for cable service, rather than only the price change in basic service.

The two primary sources of industry-wide data on cable pricing changes are the Bureau of Labor Statistics (BLS) and Paul Kagan Associates, Inc., a leading media analysis firm. According to the BLS, (see table below) the Consumer Price Index (CPI) for cable television service, which in essence reflects the average consumer's monthly bill, rose by 6.6% between 1986 and 1987, and

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69/ According to Paul Kagan Associates, premium network prices have, on average, decreased since deregulation. In December 1985, the average monthly rate for a premium service was $10.42. By December 1988, the average monthly rate was $9.90, a decrease of five percent over the December 1986 average premium rate.

70/ The results of a study conducted by independent public accountants, Arthur Andersen & Company, for NCTA in the fall of 1987 indicate that the number of basic service channels received by the average subscriber increased during the first six months of deregulation by 5.9%.

by 7.9% between 1987 and 1988.[71]

By comparison, Paul Kagan Associates found that the average monthly cable service bill in 1987 was 8.5% higher than it was in 1986.[72] However, in 1988, the second full year of deregulation, the average customer's monthly bill was only 4.2% higher than in 1987.[73]

CHANGES IN THE AVERAGE CUSTOMER'S MONTHLY BILL SINCE CABLE BASIC RATE DEREGULATION WENT INTO EFFECT

	Bureau of Labor Statistics	Paul Kagan Associates
Percentage Change 1986-1987	6.6%	8.5%
Percentage Change 1987-1988	7.9%	4.2%

71/ The annual average CPI for cable television service in 1986 was 115.5, and in 1987 the annual average CPI was 123.1, approximately 6.6% higher. In 1988, the average annual CPI for cable television was 132.8, an increase of 7.9% over the 1987 annual average figure (123.1). The "annual average" figure for a given year is derived by summing the twelve monthly CPI figures for cable television service and dividing the total by twelve. Therefore, the annual average figure reflects the "average" CPI for the year. Comparisons of average annual changes are more appropriate measures than month-to-month comparisons (such as December 1987 vs. December 1988) because the average annual CPI smooths out the seasonal and measurement variations that occur in the monthly CPI.

72/ Paul Kagan Associates, Cable TV Investor, November 29, 1988, p. 9.

73/ Ibid.

This data is also consistent with a study conducted for NCTA in 1987 by the independent public accountant, Arthur Andersen & Company. This study consisted of a nationwide survey of cable systems, and found that the bottom-line increase in the average subscriber's monthly bill for all cable services during the first six months of deregulation was 6.7%.[74]

b. Cable Penetration Has Increased Since Deregulation

Increases since deregulation in the number of homes subscribing to cable are further evidence that the changes in cable prices and service offerings have reached a marketplace equilibrium and have attained consumer acceptance. Between February 1987 and February 1989, the percentage of U.S. television households subscribing to basic cable service increased from 48.7% to 54.8%.[75]

Similarly, the number of homes subscribing to cable as a percentage of homes passed by cable has also increased since deregulation. In January 1987, cable penetration of homes passed

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74/ National Cable Television Association, Rate Deregulation: Cable Industry Pricing Changes and Service Expansion in a Deregulated Environment, November 1987.

75/ According to A.C. Nielsen data, 42,820,780 of the nation's 87,896,350 television household subscribed to cable television in February 1987. By comparison, in February 1989, there were 49,537,730 household subscribing to cable out of the total 90,320,300 television households.

was 56.5%,[76] but by February 1989, cable's penetration of homes passed had increased to 58.5%.[77]

c. Cable Service Comparison with Other Entertainment Options

Although much attention has been focused on the gradual increases that have affected the price of cable service, little note has been made of the fact that cable prices are a good value when compared to other entertainment options. According to Paul Kagan Associates, the current average monthly cost of basic service is $14.60,[78] which translates into only 49 cents per day. For this amount, the average subscriber receives approximately 35 channels of diverse quality programming, such as CNN, C-SPAN and ESPN.[79]

By comparison, a family of four spends an average of $16.64

76/ Paul Kagan Associates, Inc., Cable TV Programming, December 22, 1986, p. 8.

77/ Paul Kagan Associates, Inc., Cable TV Programming, February 27, 1989, p. 3.

78/ Paul Kagan Associates, Inc., Cable TV Investor, November 29, 1988, p. 9.

79/ The number of programming hours provided by the Top 20 commonly carried basic cable networks total 426 hours per day (NCTA, National Cable Network Directory, September/October 1988). Therefore, it is clear that cable service is a cost-effective competitor for the consumer's dollar.

just to attend one movie at a local theater.[80] Likewise, a typical VCR household pays $12 to $14 per month for the rental of just five to six video cassettes.[81] Moreover, the cost of a newspaper subscription alone averages $9.20 per month,[82] and when added to the cost of only one magazine subscription (Sports Illustrated, for example, at $5.45 per month[83]), can equal the monthly fee for basic cable service. When placed in this kind of direct comparison, it is evident that basic cable service provides significant value for a consumer's dollar.

2. Increased Programming and Construction Expenditures Since Deregulation

Since deregulation, the cable industry has been reinvesting its additional revenues to upgrade its service offerings. In particular, the cable industry has substantially increased its investment in cable programming. In 1988, spending by cable

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80/ Based on $4.16 single ticket price, the average price of a movie ticket in the U.S. (Variety, January 11-17, 1989, p. 50). While that figure is the national average, admission prices in some metropolitan areas can run as high as $7.00 per ticket (Variety, June 29, 1988, p. 6.).

81/ Based on the average rental fee of $2.40 per videotape and an average monthly rental figure of five tapes per household (New York Daily News, April 26, 1988, p. 8).

82/ Based on the average combined subscription rates for both daily and weekend editions (Donaldson, Lufkin, and Jenrette, "Information & Publishing Industry: Part I," 1988, p. 27).

83/ Based on Sports Illustrated's $65.45 annual subscription price (according to the magazine's November 1988 subscription insert).

systems for basic cable programming alone was approximately $814 million, almost two and one-half times the $302 million spent in 1984.[84]

Moreover, cable operators are reinvesting revenues to expand and upgrade cable plant and equipment. In total, the cable industry spent approximately $417 million in 1988 to upgrade and rebuild cable plant,[85] almost double the $217 million spent in 1984.[86] That money means more channels and more options for consumers. In 1984, 57% of the nation's cable customers had access to 30 or more channels. Today that figure is 81% and climbing.[87] Another major upgrade expenditure is going into a conversion to addressable converters, a technology that can provide consumers with pay-per-view options. In 1984, only 18% of cable households has addressable converters. Today that number has grown to 34% and will rise rapidly.[88]

This trend of increased expenditures to upgrade and rebuild plant is expected to continue. The cable industry is projected to spend approximately $515 million in 1989 to expand and upgrade

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84/ Estimate of NCTA, based on Paul Kagan Associates, Inc. data.

85/ Cablevision, March 27, 1989, p. 36.

86/ Cablevision, March 4, 1985, p. 31.

87/ Warren Publishing, 1988 Television and Cable Factbook, Cable & Service Volume, p. C-359; 1984 Television & Cable Factbook, No. 52, p. 1726.

88/ Paul Kagan Associates, "Cable TV Technology," October 25, 1988, p. 4.

cable plant, almost $100 million, or 24%, more than the industry's estimated expenditures in 1988.

3. Franchise Fees Produce Substantial City Revenues

The Cable Act has also produced indirect benefits for cable subscribers and nonsubscribers alike. As I noted earlier in the testimony, one of the major objectives of the cities in their bargaining efforts was to raise the federal ceiling of franchise fees, and to eliminate restrictions on the use of the fees. This provision has provided a substantial revenues for cities.

It is also worth noting again here that none of cable's actual competitors or would-be competitors pay a similar tax to the communities in which they operate.

In 1984, prior to enactment of the Cable Act, municipalities received $200 million in franchise fees,[89] and were required to devote the money to administration of the cable franchise. Since passage of the Cable Act, from 1985 through 1988, cable systems have paid an estimated $2.056 billion in franchise fees.[90] That money was available for any municipal use.

In 1988, cable systems paid $614 million to local franchising authorities. To put that figure in perspective, federal Urban Development Action Grants spent in U.S. cities in 1988 amounted to only $275 million.

78/ Cable TV Franchising, June 25, 1986, p. 4.

90/ Estimate of NCTA based on Paul Kagan Associates data.

Moreover, NCTA last year surveyed cable systems in the largest U.S. cities to learn what they paid in franchise fees and contributed to local governments and community organizations in 1987. The information obtained shows that 34 systems in 19 of the 20 largest cities in the U.S. provided over $47 million in cash, capital, and other contributions to their local franchising authorities and communities in 1987. Franchise fees accounted for more than $30 million of these payments.

In addition, the systems also made cash contributions of over $7.2 million in 1987 to public access corporations to fund programming produced in their local communities. Capital contributions, totaling more than $4.5 million, were also made by these systems in 1987 to build and maintain public access studios and other facilities.

Moreover, all of the systems in the eighteen cities reviewed provided free service to schools and other public institutions, and the average value of such service was approximately $29,000 per system during 1987. In addition to contributions to public institutions, cable companies gave generously to local community organizations such as charities and cultural funds. These gifts averaged approximately $21,000 per system and ran as high as $80,000 in some systems.

Finally, all of the above contributions were supplemented by cable system payments for purposes unique to their respective local communities. These contributions ranged from free public service announcements and videotaping of community functions to job training, drug prevention, and scholarship programs.

Contributions of the cable companies in these area amounted to $1.8 million in the cities reviewed.

4. Improved Diversity and Quality of Television

Finally, I would like to discuss what I think is probably the most important and most exciting trend in the cable industry. That is, how cable is fulfilling its promise and potential by developing and providing a diversity of programming choices for consumers.

A major assumption underlying the Cable Act was that the promise of cable television was not being fulfilled. If a more fair and stable regulatory environment could be established, it was hoped that cable owners would increase their investment in the industry, and thereby improve cable's diversity and quality.

With increasing operator investments in programming, it is therefore no surprise that top basic cable networks are projected to spend $935 million for programming in 1989,[91] up by approximately $190 million, or 26 percent, from the amount spent in 1988,[92] and almost triple the $340 million spent in 1984.[93]

Attributing improved basic cable programming to the fact that the cable industry "has more money to spend," Business Week

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91/ Paul Kagan Associates, Inc., Cable TV Programming, November 30, 1988, p. 3.

92/ Ibid.

93/ Paul Kagan Associates, Inc., Cable TV Programming, January 21, 1988, p. 1.

noted that "basic cable channels are looking spiffier" and that "these days cable channels are growing into much, much more than retirement homes for yesteryear's hits."[94]

Earlier I mentioned the Roper poll commissioned by the Television Information Office in which the public was asked to compare cable television with network television. The result was that cable got better marks than network television for sports, cultural, and educational programming, and overall quality. This change in public attitude is for good reason.

Last year, the TV critics rated the program "Dear America: Letters from Vietnam" as the best program seen on television in 1988. "Dear America" was an original production of Home Box Office.

Last year HBO won two Emmys and last month won two Oscars, all for original productions. And, Home Box Office continues to develop new and original programming of a quality seldom seen on television. This month, HBO will premier "Murderers Among Us - The Simon Wiesenthal Story."

The quality of cable is not merely limited to the pay channels. The quality is all over basic as well. The Arts and Entertainment series tracing U.S.-Soviet relations, "The Eagle and the Bear," was compared by The New York Times to the classic documentary, "Victory At Sea."

94/ "Suddenly, Basic Cable is Offering More Than Basic Fare," Business Week, March 7, 1988, p. 36.

Basic service program networks are tackling tough issues of the day in a way that the broadcast networks are not. Lifetime has run a serious examination of a growing childcare crisis in the country. The Learning Channel in conjunction with the U.S. Conference of Mayors is exploring our nation's drug tragedy.

Children's programming continues to be a major source of concern to cable and a fertile source of quality programming on cable. Shows like "Ask Mr. Wizard" on Nickelodeon, Jim Henson's "Fraggle Rock" on TNT, and The Disney Channel provide education and entertainment for children that is at least as good -- and often much better -- than anything else on television.

National Geographic specials are found only on on Superstation TBS. The Discovery Channel and The Learning Channel educate and entertain children and adults alike.

The litany of quality programming goes on. After the judgment of consumers, reflected in the Roper poll, perhaps the best evidence of our success in providing programming competition to broadcasters comes from the broadcasters themselves. There is a growing movement among broadcasters -- especially independents -- to try to copy popular cable formats. We now see broadcasters offering home shopping channels and music videos, for example. They even compete against cable with cable's own programming. When Fox launched its network with their Sunday night line-up, it featured "It's Garry Shandling's Show," a comedy series which each week shows reruns of episodes that already have appeared on Showtime.

Not only have cable operators fostered more and better cable programming by investing directly in programming networks, but they have also increased the amount of money their systems spend to acquire programming. From 1980 to 1988, the amount of money spent by cable systems for programming increased by 842%, from approximately $276 million to approximately $2.60 billion.[95] This investment only benefits cable customers by resulting in more and better television programming.

I believe that the record is clear that cable has now proved that there can be more to television than cops and robbers and half hour comedies. In a little more than four years since the passage of the Cable Act, more than half of America's television households subscribe to cable television. There is not better affirmation of cable's value and service -- because people must pay for cable and if they are not satisfied, they can choose to terminate service each month when they pay their bill.

95/ Estimate of NCTA, based on Paul Kagan Associates data.

V. CONCLUSION

In conclusion, Mr. Chairman, cable television is changing the way America informs and entertains itself. Cable is proving that the public has a great appetite for quality programming, not just broadcast network fare. The competitive flexibility and regulatory stability brought to our industry by the Cable Act has fostered an environment that encourages investment in new plant, in improved customer service and in better and more diverse programming.

A major example of how cable is changing television are two services in which we take particular pride: C-SPAN and C-SPAN II. Ten years ago, a group of cable operators created this entirely new public affairs network which was and is unique to cable. C-SPAN and its sister service, C-SPAN II, are non-profit services which transmit gavel-to-gavel, unedited coverage of the proceedings of the House and Senate, as well as other events of public importance. No one is placed between the viewer and the drama, allowing Americans to judge for themselves how their elected officials are conducting the business of the nation. We could not help but notice that the broadcast networks now frequently copy the C-SPAN format.

Cable News Network and Headline News also have changed the way Americans become informed. Up to the minute news is available 24 hours a day. It is no longer necessary to be home at 7:00 pm in order to find out what is happening around the world. Cable customers can find out any time.

To the degree that the breadth of choice the American society gets on television has been enlarged, to the degree that there is diversity of programming available to consumers, cable has been responsible for it. Cable has made a positive difference in the way this society uses television and now that we have completed our great construction period, more and more money is going into programming and the difference will become even greater. Cable operators are taking part of their cash flow and plowing it back into new programming to further make good on the promise of our medium. Additionally, the focus has also turned to improved customer service and upgrading and modernizing current plant and equipment.

As Jeff Greenfield wrote in TV Guide, "In one key sense, cable has made it possible to deliver fare that could not find a place on broadcast outlets, but that is immensely appealing to minority audiences. Taken together, those minorities add up to millions of viewers for whom cable has become a leisure time lifeline." Or as John O'Connor of The New York Times wrote, "The increase in the quantity of commendable programs [on cable] is little short of startling."

Television can never go back to sitcoms and detective shows as its sole fare. The television viewer of today is too sophisticated, too used to choices, lots of choices, too used to competition. That is the challenge all providers of programming must meet, and one that we gladly face.

We think that's good for our industry, but more to the point, we believe it's good for the television viewing public.

APPENDIX I

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
Amendment of Part 76 of the) MM Docket No. 85-349
Commission's Rules Concerning)
Carriage of Television Broadcast)
Signals by Cable Television Systems)

SUBMISSION OF JOINT INDUSTRY AGREEMENT

Introduction

As the Commission is aware, the National Cable Television Association ("NCTA"), the Community Antenna Television Association ("CATA"), the National Association of Broadcasters ("NAB"), the Television Operators Caucus ("TOC"), and the Association of Independent Television Stations, Inc. ("INTV"), have reached agreement on a proposal for a modified "must-carry" rule to replace the regulations struck down in *Quincy Cable T.V. Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985). The basic premises underlying the agreed-upon proposal are that the Communications Act recognizes free, over-the-air broadcasting and subscription, closed transmission cable service as the two principal distribution systems for television programming and that limited must-carry rules will serve the public interest by ensuring that there will continue to be available a reasonable quantum of free television service. We recommend that the Commission adopt the proposed agreement.

Discussion

The agreement reached between NCTA, CATA, NAB, INTV, and TOC generally calls for the adoption of rules under which cable television systems with more than 20 activated channels would be required, subject to certain conditions, to devote a limited portion of their capacity to the carriage of "qualified television broadcast signals."[1] The following discussion summarizes and explains the terms of this agreement.[2]

1. "Qualified Television Broadcast Stations." The agreed-upon proposal would establish a limited right of carriage for "qualified television broadcast stations." A "qualified television broadcast station" is defined as (a) a television broadcast station which (b) is licensed to a community whose reference point is located within 50 miles of the principal headend of the cable system on which it seeks carriage and (c) has achieved a 2 percent share of viewing and a 5 percent net weekly circulation in non-cable homes, by county.

a. Television broadcast stations. The term "qualified television broadcast station" includes only television broadcast stations operating on a channel regularly assigned to its community by Section 73.606 of the Commission's rules.[3] It excludes other television outlets, such as low-power television stations, television translator stations, and other passive repeaters which operate pursuant to Part 74 of the Commission's rules. However, cable carriage of these other outlets will continue to be permitted under the Commission's rules. Television broadcast stations licensed by a foreign government will not be entitled to assert a right to carriage, but may be carried at the cable operator's discretion.

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[1] A copy of the agreement is attached as Exhibit A.

[2] The parties currently are working together to draft specific regulatory provisions which the Commission could adopt to implement the terms of the agreement described herein. The parties intend to submit these draft rules as soon as they are completed.

b. 50-Mile standard. Under the agreement, the 50 mile zone will be measured between the reference point of the broadcast station's community of license and the location of the cable system's "principal headend."[4] The cable system's "principal headend" is the location of the equipment used to process television broadcast signals for distribution to subscribers.

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[3] Satellite television stations which originate programming will be entitled to carriage, except that if a satellite and its parent would both be entitled to carriage, the cable system would be required to carry only one of these signals and may select between them.

[4] The list of reference points in the former must-carry rules will be retained for the purpose of determining whether a station is located within fifty miles of a cable system's
(Footnote continued)

In some cases, several locations may fit the definition of principal headend. In such cases, the cable operator shall designate one location to be considered the system's principal headend.

c. Viewership standard. "Qualified television broadcast stations" not only must meet the 50 mile standard, but also must satisfy a viewership test.[5] Specifically, in order to qualify

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(Footnote 4 continued)

principal headend. Each television broadcast station will have only one reference point. Stations that previously were considered part of a hyphenated market must use the reference point for the station's assigned community of license, as set forth in Section 73.606. (In a few instances 73.606 lists a hyphenated pair of cities for a particular allocation (e.g., Tucson-Nogales); the reference point for such stations will be that of the one community designated as the station's community of license. See Section 73.1120).

[5] The "significantly viewed" standard is similar, but not identical to the viewership standard to be applied in determining whether a station is "qualified." Determining a station's significantly viewed status, while no longer relevant to carriage rights, continues to be important in determining whether a system is subject to "effective competition" under Section 76.33 of the Commission's rules. (It also remains important in distinguishing "local" from "distant" signals under Section 111(f) of he Copyright Act). To avoid confusion, we suggest that the provisions of the Commission's rules concerning the determination of significantly viewed status be retained, but as part of Subpart C, rather than Subpart D.

for carriage, a station (commercial or non-commercial) will have to be able to demonstrate, using independent professional audience surveys, that it has achieved an average share of viewing hours of 2 percent and an average net weekly circulation of 5 percent for the previous "television survey season."[6/] The measurements must be based on non-cable households in the county served by the cable system.[7/]

d. New stations. Both the mileage and the viewership criteria will be applicable to all television stations. However, with respect to newly operational stations, the viewership standard will be measured somewhat differently than for existing stations. Anytime following a new station's initial sign-on pursuant to program test authority, the station may satisfy the viewership test by presenting survey evidence gathered by a recognized rating service (e.g., Arbitron or Nielsen) demonstrating that the station has achieved a two percent share and five percent net weekly circulation in non-cable homes in the

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6/ The "television survey season" is the 12-month period beginning in April and ending the following March. The average viewing data must be based on measurements made during a separate consecutive four-week period in each of the four quarters of the survey season (i.e., April-June; July-September; October-December; January-March).

7/ In those few instances where the area served by the cable system crosses county lines, the county in which a plurality of the system's subscribers reside shall be considered the "county served by the cable system" for purposes of determining viewership.

county served by the cable system. Once a new station has satisfied this test, it will retain its status as a "qualified television broadcast station" until survey data for the station's first full television survey season is available. Thereafter, the station will be considered an existing station and must achieve the requisite viewership for an entire television survey season to retain "qualified" status.

2. Limitation on Number of Qualified Stations Required to be Carried. In accordance with the agreed-upon proposal, there will be limits on the number of "qualified television broadcast stations" that a system can be required to carry, depending on the system's channel capacity. For example, a system with 20 or fewer "useable activated" channels will not be required to carry any television broadcast stations.[8/] A system with between 21 and 26 useable activated channels will be required to devote up to but no more than seven of those channels to the carriage of qualified stations. And, a system with 27 or more useable activated channels will not be required to devote more than 25

[8/] "Useable activated channels" are those defined as "activated channels" in 47 U.S.C. Section 532(b)(5)(A), excluding channels reserved against interference with aeronautical frequencies.

percent of those channels to the carriage of qualified stations.[9/] Moreover, where the number of qualified television broadcast stations exceeds the number of channels that a system is required to devote to broadcast station carriage, the cable operator will have complete discretion to decide which qualified signals will be carried.[10/] Finally, a system will not be required to carry an otherwise qualified television broadcast station if the station does not deliver a good quality signal to the cable system's principal headend.[11/]

3. Resolution of Disputes Over Carriage. The burden of establishing a right to carriage will fall on the broadcast station seeking carriage. The station demanding carriage may petition the Commission for a determination of its carriage rights. The petitioning station will bear the burden of convincing the Commission that it satisfies the mileage standard and viewership test and that the cable system is not otherwise

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[9/] In calculating the number of channels which a system must devote to carriage of qualified broadcast stations, all fractions are to be rounded to the nearest whole number. Fractions .5 and above are to be rounded up; fractions below .5 are to be rounded down.

[10/] For example, if nine signals qualify for carriage on a system with 24 useable activated channels, the cable operator may choose to carry any seven of the nine.

[11/] Engineers representing the cable and broadcast industries will be meeting in the near future to discuss an appropriate standard which could be adopted by the Commission for determining whether a broadcast signal falls within this exception.

carrying its limit of "qualified television broadcast stations." (Where a cable operator refuses to carry a station on the ground that the station does not deliver a good quality signal to the system's headend, the station will bear the burden of proving, with appropriate engineering data, that it meets this requirement). If it is determined that the station is entitled to carriage, the Commission will order the system to add the station.

4. Duplicate Network Affiliates. If the television stations qualifying for carriage on a particular cable system include two or more affiliates of the same commercial or noncommercial network, the proposed rules will permit but will not require the cable operator to carry more than one such affiliate For example, if five stations qualify for carriage on a system with 24 useable activated channels, and two of those stations ar affiliates of the same network, the system can choose to carry either or both of the stations. If the number of qualifying stations on the same system is nine (and two of the stations ar affiliated with the same network), the system will be free to carry either, both, or neither of the affiliates. Moreover, as part of the agreement concerning carriage regulation, network non-duplication protection (Subpart F of the Commission's current cable rules) would be eliminated.

5. Copyright Consequences. Generally speaking, the proposed regulations should not have any impact on a cable system's copyright royalty payments. This is because Section 111(f) of the Copyright Act of 1976 grandfathers the must-carry rules in effect on April 15, 1976 as a dividing line between distant signals (for which per signal royalties are paid by larger cable systems) and local signals (the carriage of which does not affect the amount of a such systems' royalty payment). However, because the proposed 50-mile zone is larger than the 35-mile zone in the former must-carry rules, there is at least a theoretical possibility that a station could both qualify for carriage under the proposed rules and obligate the system to pay distant signal copyright fees occasioned by that carriage. In order to account for this possibility, the agreed-upon proposal includes an exception which will permit a cable system not to carry an otherwise qualified station if the station would be considered a distant signal under the Copyright Act. Of course, if a cable system nonetheless carries a station which is subject to this exception, the system may count the station in determining whether the system's limit on carriage of qualified stations has been satisfied.[12]

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[12] Moreover, in order to reduce the disincentives to carrying a station which is considered a distant signal for copyright purposes, cable operators would be allowed (but not required) to accept payment from the station equal to the additional copyright expense attributable to the station's carriage.

6. Manner of Carriage. Under the agreement, there would be no "on-channel" cable carriage requirement, for either VHF or UHF television stations. Stations may be carried on any channel or frequency. However, all qualified stations that a system is required to carry will have to be carried in their entirety on the lowest-priced, separately available tier of service offered by the cable system.[13] Moreover, the phrase "in their entirety" refers to the station's primary video and accompanying audio transmissions. Retransmission of material in the vertical blanking interval or other enhancements of the primary audio and video signal (including multi-channel sound, teletext, and material carried on subcarriers) will be left to the discretion of the cable operator.

7. Charging for carriage. Finally, as a general matter, cable operators would be prohibited from accepting any payment or other consideration from stations which qualify for carriage (whether or not the system actually is required to carry the station) or from stations which would have been entitled to carriage under the former must-carry rules. There are two limited exceptions. First, as we previously noted, a qualified television broadcast station will be allowed to reimburse a cable operator for copyright costs associated with the station's carriage. Second, because broadcasters will be obliged to

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[13] A "tier" of service consists of a package of two or more services. Thus, a single service offered on a per-channel basis may be priced below the price of the tier containing the qualified broadcast signals.

deliver a good quality signal to the cable system's principal heade in order to be entitled to carriage, they will be permitted to pay cost of satisfying this obligation (including the cost of installin additional receiving or transmitting equipment or of using CARS or common carrier microwave links).

Conclusion

NCTA, CATA, NAB, TOC, and INTV jointly recommend that the agreement described above be adopted by the Commission. However, i order that the Commission may have the benefit of views of other parties regarding the agreement, we request that the Commissi issue a further notice of proposed rule making in this proceeding seeking public comment on the terms of this submission.[14/]

Respectfully submitted,

NATIONAL ASSOCIATION OF
BROADCASTERS

By /s/ Henry L. Baumann
Henry L. Baumann

By /s/ Julian L. Sheppard
Julian L. Sheppard

Its Attorneys

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NATIONAL CABLE TELEVISION
ASSOCIATION, INC.

By /s/ Brenda L. Fox
Brenda L. Fox

By /s/ Seth A. Davidson
Seth A. Davidson

Its Attorneys

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[14/] The individual parties to this submission reserve the right to comment further on this agreement and on any other matters raise by the initial notice of proposed rule making and comments submitted in response thereto.

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ASSOCIATION OF INDEPENDENT
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EXHIBIT A

February 25, 1986

Mr. James P. Mooney
President
National Cable Television Association, Inc.
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Dear Jim:

It has been our objective for the past several weeks to fashion an agreement which would provide for a modified must carry rule meeting the concerns expressed by the D.C. Court of Appeals in the Quincy case. We believe the proposal set forth below accomplishes this end. It has been approved by the Executive Committees of the three associations we represent. If the NCTA Executive Committee will approve this agreement, we will take it to our full Board for approval and subsequent submission to the FCC in its current rule making proceeding on must carry. Our proposed agreement follows:

A. Rationale for a Modified Must Carry Rule

The Communications Act sets up two principal forms of television distribution: free over-the-air broadcasting and subscription, closed transmission cable. Must carry is necessary to protect the public interest in a reasonable quantum of free television being available to the public.

B. Specifics of the Rule

1. Cable systems with 20 or fewer activated channels are exempt.

2. Cable systems with more than 20 activated channels must carry all qualified local television stations. Such stations are defined as those which (a) are located within 50 miles, as measured from the principal cable headend to the reference point of the station's city of license and; (b) receive a 2% share and 5% net weekly circulation in non-cable homes, by county.

(Qualified local stations which were classified as distant signals under the old must carry rules do not have to be carried where copyright obligations continue to require treatment as distant signals.)

3. New stations may, at any time after sign-on, demonstrate they meet the 2%/5% viewing standard by presenting survey evidence gathered by a recognized ratings service (e.g., Arbitron or Nielson).

4. Must carry will only be accorded to primary full power television stations. Translators, low power, and other passive signal repeaters do not have to be carried.

5. Systems with 21 to 26 activated channels are not required to carry more than 7 qualified local stations. Systems with more than 26 activated channels are not required to devote more than 25% of those channels to carriage of qualified local stations. "Activated channels" means those channels engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, less channels reserved against interference with aeronautical frequencies.

6. Where the number of qualified local stations exceeds the 7 or 25% caps, the system selects the stations to be carried. No preferences exist in this selection process for network affiliates or any other type of station.

7. Systems are not required to carry more than one qualified local network affiliate station of the same commercial or public network. The system makes the selection.

8. A system does not have to afford non-duplication protection where it chooses to carry more than one station affiliated with the same commercial or public network.

9. A system cannot charge for carriage of a non-distant signal which is covered by the compulsory license. Stations which qualified or would have qualified for must carry under the old rules and no longer so qualify for mandatory carriage are to have may carry status.

10. Systems are not required to carry signals contained in the vertical blanking interval (VBI), e.g., teletext, or other primary signal enhancements, e.g., multi-channel sound.

11. Systems are not required to carry stations on their channel positions, but must carry all qualified local stations in their entirety on lowest priced tier.

12. Must carry is conditioned upon delivery of a good signal by the broadcast station to the cable headend. "Good signal" is to be defined by engineers.

We are prepared to join with you as soon as possible to brief the appropriate government officials and seek their approval as to the specifics of this agreement.

Edward O. Fritts Margita E. White Preston Padden

Edward O. Fritts
President
National Association
of Broadcasters

Margita E. White
Coordinator
Television
Operators
Caucus, Inc.

Preston Padden
President
Association of
Independent
Television Stations

February 26, 1986

Mr. James P. Mooney
President
National Cable Television Association
1724 Massachusetts Avenue, N. W.,
Washington, D. C. 20036

Dear Jim:

As a supplement to our letter of February 26, 1986, setting forth a proposed rationale and must carry rule, we also propose the following political undertakings:

POLITICAL UNDERTAKINGS

1. This agreement is not finalized until a majority of FCC Commissioners and key Members of Congress have agreed to its specifics.

2. The undersigned organizations agree to withdraw their support of the Frank, Bryant and Trible-Gorton bills dealing with the compulsory license, will inform the sponsors of their position, and will not seek other legislation to repeal the compulsory license.

   In addition, the undersigned organizations will not seek to stop or amend a bill to which NCTA and MPAA may agree which would replace the current distant signal rate schedule with a simplified "flat fee" plan.

Edward O. Fritts
Edward O. Fritts
President
National Association
of Broadcasters

Margita E White
Margita E. White
Coordinator
Television
Operators
Caucus, Inc.

Preston Padden
Preston Padden
President
Association of
Independent
Television Stations

Senator METZENBAUM. I have a number of questions, but one of the members of our committee has joined us. I am very pleased that he has, and I thought that he might have an opening statement before we get into questions.

Senator Specter?

Senator SPECTER. I thank you very much, Mr. Chairman. I will start by commending you, Mr. Chairman, for convening these important hearings. I express my regret that I could not be here earlier.

Many in this room know, but some do not and some who may be viewing this on cable might be interested to know, that each Senator has many, many conflicting commitments. I just came from a hearing, actually from a floor vote and before that from a hearing with Secretary of State Baker on Nicaragua. So I want to express my regrets at not being here.

Senator METZENBAUM. We have had Senators coming and going all during the morning. I think most people realize it.

Senator SPECTER. I think a word of explanation might be in order because many people who may be watching this on cable wonder why more people are not here. They may not have the requisite familiarity with what happens in the Senate. So even a repetitive word might be somewhat useful.

Senator METZENBAUM. I will attest to the fact that you are a hard-working Senator. [Laughter.]

Sometimes you do not vote right, but you are a hard-working Senator.

Senator SPECTER. And I will file an affidavit that you are harder-working Senator, but you always vote right. As you see it. [Laughter.]

I would start, Mr. Chairman, with a brief opening statement, with a reference to the last comment by Mr. Mooney about complaints on prices and customer service, and say that it is a major, major issue. There are real concerns about the passage of the Cable Act of 1984, deregulating the industry and limiting State and local regulation, which requires a very close scrutiny. The problems of horizontal integration and vertical integration are matters which we have to look at very carefully with respect to the antitrust implications.

There have been major problems on having cable accessible to American households, and that is a multifaceted issue. Perhaps some of the responsibility lies with the cable industry as well as with cities and their very slow franchising efforts. I have considerable familiarity with one consumer who was outraged about what cable has done, and especially the prices. She, my wife, has recently succumbed and is ordering cable, but she has been very, very unwilling to order cable because of her concerns about the prices and the monopoly situation and, simply stated, what it costs and the service issue.

I would like to touch briefly on one other subject which Senator Metzenbaum and I have discussed at some length, and that is the issue of pay television for sports. I am hopeful that our crowded schedule will enable us to have a specific hearing on this subject at a later time. The concern which I express is on pay television, pay-per-view, where I believe there is a real risk that one day soon we may see the Super Bowl or the World Series or the League Championship Series on pay television.

In a context of a free market, businesses are entitled to do whatever they choose. There is a real issue as to how you precisely define sports—baseball, football, and others—as to whether it is a real business or whether it is a sport as defined by Justice Holmes many decades ago to take baseball out from under the antitrust laws. But however you define sports—business, sport, whatever—there is no question that sports have a preferred status under the antitrust laws because of the exemption which baseball enjoys and because of the legislation which football enjoys, the 1961 statute on pooling.

It is this Senator's view—and we have had a number of hearings on the related subjects back in 1982 when Oakland moved to Los Angeles, hearings when the Eagles almost moved to Phoenix, and hearings on the Baltimore move—that the preferred status that football enjoys is occasioned by an antitrust exemption. Where there is an antitrust exemption, there is a higher duty on the beneficiary of that antitrust exemption to act in the public interest, or Congress has to be very vigilant to perhaps consider removing the exemption if the profit motive dominates any concern for public welfare.

I recently had meetings with Commissioner Rozelle and Mr. Modell, who is the chairman of the league, and got assurances that professional football was not about to go to pay television. I would say this publicly; I have repeated it privately to Senator Metzenbaum: I am hopeful that we can have those officials and others come before this committee to say that publicly.

The financing of professional football concerns me tremendously when you have either $140 or $180 million being paid for the Dallas Cowboys. I wonder how they are going to survive unless they move into some part of pay television. The figures are astronomical. If the Super Bowl went to pay television, it would easily bring in in excess of $500 million, a half a billion dollars. And I am concerned about what is happening with ESPN, on cable, because it is pay television. Only the toe is in the door perhaps, but before ESPN took over on Sunday night football, we saw it free. I am concerned about what is happening with ESPN and the new baseball contract. I am concerned about what is happening with the New York Yankees in a very complex arrangement where many, many Yankee viewers are not being able to see the games because some cable systems are not carrying it. There is some controversy between the cable system and some other entrepreneur along the line. I am hopeful that those problems are worked out so that this subcommittee does not have to get into it.

But I think on this hearing that it is worth these few moments for these views to be expressed, because I do not think that the American public will sit by and have excessive profiteering in a business which benefits from an antitrust exemption. I think that warning ought to be loud and clear, and I am hopeful that there will be a more formal statement by the subcommittee or by the Congress on this subject, because I think there is a very vital public interest involved.

Thank you, Mr. Chairman.

Senator Metzenbaum. Senator, you indeed have raised those questions with me. We have discussed the matter of a public hearing, and I share many of your concerns and hope we will be able to get into that before the not too far distant future.

Senator Specter. Thank you, Mr. Chairman.

Senator Metzenbaum. Mr. Levin, first, I want to thank you for the fact that Time, Inc. and Warner both were readily available, actually came forward early on with respect to the merger discussions, the fact that the matter was moving forward, and I appreciate your coming before us to advise us of your position today. I am frank to say that Viacom has been invited to these hearings on two separate occasions and has not seen fit to show up. Cablevision Industries, also a large vertically integrated company, has declined to testify. So I do appreciate your participation and the openness with which this matter has been addressed by your people.

Mr. Levin. Thank you, Mr. Chairman.

Senator Metzenbaum. As you know, I had a number of concerns and still have a number of concerns about the Time-Warner merger, which I articulated in a letter to the Department of Justice. One concern is that the new Time-Warner entity will withhold its existing and new program ventures from competitors of cable.

Now, I am aware of the fact that with respect to Metroten, the Cleveland operator, I had raised that question earlier and am aware of the fact that whether by reason of that fact or whatever the cause, it has now been worked out, at least as an agreement in principle. And I am pleased to see that develop. But there is a whole vast array of other wireless cable operators who are not able to secure the services that are available from your company.

My question relates to whether or not you are prepared to delineate specific technical and financial criteria which other wireless operators or other noncable technologies would have to meet in order to obtain your programming, and whether or not you would be willing to provide your programming to those who meet that criteria.

Mr. Levin. Let me start, Mr. Chairman, by saying that this is separate and apart from the Time-Warner merger. We are really talking about the distribution practices of Home Box Office, and there is a long history there that we refer to in our testimony.

I would like to begin by saying that with respect to MMDS, multiple-channel MDS, HBO has, indeed, reached an agreement with Mr. Theroux, and we are pleased with that. That is moving forward. At the same time, we have an arrangement with Microband, which is the largest MMDS distributor, to test our service in three areas—New York, here in Washington, and Detroit—and over the summer to introduce a scrambling technique that we very much hope will work.

But we are all products of our own experience, and I would have to say to you that in my own case, in 1974, I negotiated the very first use of MDS for carrying a program service. That is some time ago, and that typifies, I think, HBO's approach which has been to use all available technologies, and perhaps to use them even before we fully understands the consequences.

In that case—and it is some years ago—we eventually saw that there was difficulty with MDS in the sense that we experienced as a business many failing companies who were unable to pay their bills. So there was a substantial bad pay that HBO experienced, and that is indicated in our testimony.

Second, it has been difficult to find an acceptable security mechanism to deliver the service so that we do not have theft. In fact, we believe that there may be as many as 1 million homes who are receiving the service, via MDS without paying. That is an enormous loss of a couple of hundred million dollars of revenue opportunity.

Also in my own case, Mr. Chairman, I have had an MDS dish in my house since 1976. And I would say to you when the springtime comes, there is a problem when the leaves come out. This is a line-of-sight microwave signal; the picture gets a little fuzzy.

Now, despite that fact, we are anxious to work with MDS operators and see whether this new multiple-channel use of MDS will work, and that is why we have entered into these arrangements. And we want to track it on a case-by-case, market-by-market basis. But we have always been open to using new and available technologies, but not at the penalty of losing a substantial amount of money.

Senator METZENBAUM. Mr. Levin, Mr. Nicholas of your company was in to see me. He indicated that one of the reasons you have not made your programming available to more of the wireless cable operators is the question of security, the question of collecting your bills, a very understandable and logical position for a business company to take. On the other hand, we are realistic enough to know that you can use letters of credit, you can use certain financial guarantees, you can use certain deposits to protect against that.

My question to you is: Is the Metroten deal in Cleveland an indication that HBO and Time, Inc. is now prepared to make available on a broader base, to a broader group of operators, your programming?

Mr. LEVIN. I think what it means, Mr. Chairman—and we have made available to you the letter that Mr. Theroux has written to Home Box Office—is that in that particular market, there is an understanding not only about the financial capability, but there is some view on security and how this service is going to be delivered. In that particular case it is part of—as you indicated earlier in these hearings—a voted franchise so that the service will be provided throughout that franchise area, and that there is a marketing plan that provides Home Box Office with quality distribution so that we can understand the impact and the way the service will be dealt. We invest vast resources in programming—and I know, Mr. Chairman, you had an opportunity to screen what I think is one of HBO's finest programs, "The Simon Wiesenthal Story," last week. It is not just that investment in programming. It is how it is presented to the consumer, what kind of service is given. We need to assure ourselves that our distribution will not be adversely affected.

In the case of Mr. Theroux and Metroten, HBO is satisfied that this distribution will take place.

Senator METZENBAUM. Mr. Levin, if you can, answer my questions a little bit more briefly because we are running out of time. But I have a couple more for you.

The wireless people indicate that their signal-securing mechanism, the Zenith Z-TAC, is the same one used by Time, Inc.'s cable company, ATC. Indeed, there is no indication that there has been any signal security problem with the basic cable networks which wireless cable operators are carrying. And while you may have had problems in the past when wireless was a single channel distribution system, it is now a multichannel delivery system.

I guess I can just ask this question yes or no. Is Time, Inc.-Warner prepared to make available your programming services to all systems of delivery of program to the homes, provided that you can obtain protection, adequate security protection as well as seeing to it that your bills are paid?

Mr. LEVIN. As I indicated, we will use all available technologies and on a market-by-market, case-by-case basis. We are prepared to make those judgments. I would also——

Senator METZENBAUM. I guess your answer is sort of no.

Mr. LEVIN. No. That is not the answer because, clearly, we are moving forward in the case of Microband and Metroten. And as each applicant, as we talk to each company, those judgments will be made as they have been made in distributing to satellite dishes and to SMATV, satellite master antenna systems, in the past.

At the same time, Mr. Chairman, if I might, if it would serve any purpose, your question on Z-TAC, rather than taking your time, I have a letter from Jim Chiddix, our engineering and technology vice president of ATC, pointing out the differences between the use of Z-TAC on a cable system, where we have several levels of security, including just trapping out the cable, and using the Z-TAC technology over the air. And there is a difference. Rather than taking your time, maybe that could be offered for the record.

Senator METZENBAUM. It will be included in the record.

[The letter of Mr. Chiddix follows:]

Jim Chiddix
Senior Vice President
Engineering & Technology

ATC

American Television &
Communications Corporation

Corporate Headquarters
300 First Stamford Place
Stamford, Connecticut 06902-6732
203 328 0600

April 11, 1989

Gerald M. Levin
Vice-Chairman
Time Incorporated
Time/Life Building
Rockefeller Center
1271 Avenue of the Americas
New York, NY 10020

Dear Jerry:

I thought I would pass along our views on Zenith Z-TAC security for use in MDS systems. As you are probably aware, ATC uses Z-TAC addressable descrambling converters for the delivery of some pay television services in some of our cable systems. Nevertheless, we have deep concerns about the use of Z-TAC scrambling (which involves fairly simple modifications to the video signal) in an over-the-air delivery systems such as MDS.

In a cable system we have two levels of signal security. Our primary means of controlling who watches our signals arises from our ability to connect and disconnect the cable drop to each home, and, if necessary, to install "traps" in that drop to remove individual channels. This is done at the utility pole, or underground equipment pedestal, and can be audited by us without gaining access to the subscriber's home. If we believe that a subscriber has obtained an illegal descrambling device in order to gain unauthorized access to one of our premium services, we have the option of either disconnecting him, or trapping that channel to prevent its reception.

By contrast, in an over-the-air broadcast environment, all signals are available to all homes within the market. This means that physical control of the signals is lost, and only the scrambling prevents unauthorized viewing. It is our opinion that the use of relatively unsophisticated Z-TAC scrambling in that application sows the seeds for massive piracy.

I would be happy to discuss this matter with you further if you would find it helpful.

Very truly yours,

Jim Chiddix

James A. Chiddix
Senior Vice President
of Engineering & Technology

Providing entertainment and information choices

Senator METZENBAUM. Another concern I have about the Time-Warner merger is that it illustrates how all the consolidation and concentration going on in the cable industry is not benefiting consumers. Consumers still do not have a choice among cable systems at the local level. Is it not true that the Time-Warner merger will not increase choices to cable consumers, but will simply consolidate a larger number of local cable monopolies under common ownership?

Mr. LEVIN. I do not believe so, Mr. Chairman. First of all, we believe there is substantial competition, as I indicated in my testimony, for cable. At the same time, what both Time, Inc., through ATC, and Warner Cable are doing—and if I just look at the last 5 years as an example—both companies have invested something on the order of $1.3 billion in constructing new plant and expanding channel capacity. So basically what both of our cable companies are dedicated to is providing more channels, more program diversity, and we have made a substantial investment in capital expenditures to provide that.

Senator METZENBAUM. Mr. Levin, I have more questions, but Senator Specter has one that he would like to interject at this point.

Senator SPECTER. I appreciate that, Mr. Chairman, because I cannot stay too much longer.

I have a question relating to the same line which Senator Metzenbaum has been pursuing in terms of the concentration. I would like you to comment on a statement which Mr. Valenti made from the Motion Picture Association. There is a commentary in a recent publication, "Communications Report," that the three largest cable firms control or have an interest in systems that serve nearly a third of the Nation's 45 million subscribers. Jack Valenti, who has his own industry to be concerned with, appropriately so, made this comment, that he thinks you have a monopoly, saying, "Cable owns the store and is producing the sugar. Therefore, if you have sugar, you cannot sell it because they are producing their own sugar. That is a monopoly." That puts it rather graphically.

Mr. Mooney, do you have a monopoly?

Mr. MOONEY. No, Senator. I think that cable does compete with other forms of video, primarily over-the-air broadcasting. You know, the presence or absence in a given market of quality over-the-air broadcasting has a lot to do with people's judgment about whether they want to subscribe to cable at all. And I think in terms of concentration that if you will look at other sectors in the entertainment business—theatrical box office receipts come to mind, records, videotape distribution—you will see concentration levels that are even higher. So this is not an unusual circumstance.

Mr. Valenti's group and mine have had certain differences over the years, and we periodically flail at each other in public. But with all respect to Jack, I do not think that our situation is significantly different than that of the companies he represents in terms of the number.

Senator SPECTER. Mr. Levin, somewhat differently stated, is cable television, if not a monopoly, coming dangerously close to being a monopoly to warrant some more Federal regulation?

Mr. LEVIN. No, I do not believe so, Senator. And, by the way, I have a letter that Mr. Valenti sent right after the announcement of the Time-Warner merger to several members of Congress indicating that he did not find the particular Time and Warner merger to be a problem in this regard.

Senator SPECTER. So you think he has special credibility?

Mr. LEVIN. In this connection. [Laughter.]

If I could just point to, in terms of my strong conviction that cable is not a monopoly, at some point I would invite your attention to the Warner Communications annual report. There is a center spread that talks about what has happened in the television business since 1980. There has been an enormous revolution, and it goes on to point out that what we have seen is the growth of the videocassette, so that on a Saturday night most people are renting their movies. Indeed, broadcast television really does decline on Saturday night. They are either renting their movies or going to the new 12-plex, where there are 12 motion picture theaters in one location, so you have this very significant choice, the increased number of movie theaters. And at the same time, the explosion of independent television and one other item, which is the compact disc that uses digital technology. The reason I mention that is I think it is the symbol for me, as we look down the road of what the future may bring. That technology can provide music, video, films, and eventually information, because it can handle 54,000 pages of information.

All this technology is coming along at a time when the cable industry itself is performing in a way that I think is quite admirable when you have this kind of competition.

The last thing I would say is that our research indicates that those who are not buying cable—and there are a lot of them—make that decision because they believe that the combination of the VCR and over-the-air broadcasting give them all the television they need. In Denver, for example, after 6 years we still only have 35 percent of the people——

Senator METZENBAUM. I have a lot of witnesses yet this afternoon.

Mr. LEVIN. I apologize, Mr. Chairman. The key is they are saying between their VCR and broadcast television they have satisfactory service.

Senator SPECTER. Thank you very much.

Senator METZENBAUM. Thank you, Senator Specter.

Mr. Levin, I am also worried that your cable systems will discriminate against program ventures which are similar to programming developed and controlled by Time-Warner. This is not an idle threat. Let us face it. If you own the program and somebody else has a competitive service available, and you also own the cable television stations, you are going to favor HBO, you are going to favor Time-Warner programming.

Now, that is not an idle threat. It is not just a conjecture in my mind. In 1986, a group of Manhattan cable consumers had to sue to get the Time, Inc. cable system in Manhattan to carry a pay movie service other than HBO or Cinemax. What assurances can you give that the increased vertical integration resulting from the merger will not lead to more such anti-competitive practices?

Mr. **Levin**. It is a fundamental premise, Mr. Chairman—I understand the question—that when we have more channels, we need to fill those channels with services regardless of what their ownership auspices are.

In the case of Manhattan that you cite and ask about, now that we are upgrading and rebuilding the system in southern Manhattan, we have not only Home Box Office and Cinemax but the Sports Channel and Bravo, and shortly we will have Disney and Showtime. In northern Manhattan, a system that we manage, Paragon System, Showtime has been on that system for some time.

Indeed, in ATC systems, approximately 75 percent of our ATC systems carry Showtime, which, as you know, is owned by Viacom. And we have a list in our testimony that indicates the extent of our support for program services regardless of their ownership auspices. When we have this developing channel capacity, we want to fill it with services that the consumer wants regardless of ownership origin.

Senator **Metzenbaum**. Mr. Levin, as a result of the merger, is it not a fact that Time-Warner will control more than 50 percent of the cable subscribers in both the city of New York and the State of New York?

Mr. **Levin**. I do not believe that is correct, Mr. Chairman. When you say "control," we have in the city of New York southern Manhattan, and we have a 50 percent interest in northern Manhattan. We have a 50 percent interest in some systems outside of the city. But I think you will find that our cable systems have been responsive and responsible, both for ATC and Warner Cable, in the city and throughout the State of New York. And we are very proud of that.

Senator **Metzenbaum**. Mr. Mooney, in the past, you have stated that the cable industry is not a monopoly. But just last week, the Wall Street Journal called you a monopoly. One prominent investment firm, in the course of recommending that investors purchase TCI, referred to the cable revenue stream as a monopolistic annuity. The market apparently agrees with this assessment since cable companies are valued at about three times replacement cost. The simple fact if a consumer wants to get cable, he or she has only one choice in 99 percent of the communities in the United States. If that is not a monopoly, what is?

Mr. **Mooney**. Senator, let me begin by saying I frequently disagree with a great many of the opinions expressed by the editorial writers of the Wall Street Journal, and this case is no different.

Senator **Metzenbaum**. Well, I always disagree with them. [Laughter.]

But that does not make them necessarily wrong.

Mr. **Mooney**. I think the question of whether cable is a monopoly really is decided by how you define the relevant market. We think the relevant market is television. We think people increasingly do not make much of a distinction in terms of satisfaction, according to what means the television signal arrives in their house, but they do make judgments having to do with whether they should pay for television. Whereas, in a lot of places, most places, in fact, almost everywhere, they can get it for free.

In order to get people to pay a monthly fee—as I said, the average is about $14.50 a month—you really have to show them that you have got something better. But that is not to say that there are no price constraints operating on cable service either. I think that there are most definitely price constraints, especially in a lot of the large new urban builds we have completed in recent years and where our penetration levels are much lower than the national average.

In any event, if you are like us, an industry which has pretty much built every place there is to build and whose growth imperatives now are very strongly to increase penetration within already-wired areas, you have to exercise some price restraints, or people are going to turn you down because they will just be happy to get their TV off air.

As to the fact that there tends in most places—almost everywhere, in fact—to be a single cable system, that is the product of a system of regulation under which this industry grew up. The city governments decided some while ago, with the approval of the then-FCC—and I am referring to a time back in the late 1960's and early 1970's—where effectively auction processes were run in each city to award the franchise, in return for which the franchisee was expected to concede a whole array of uneconomic services and to make uneconomic payments, starting with franchise fees but not limited to them, to the regulatory authority in return for that franchise. The Cable Act vindicates, approves, and continues that arrangement.

Senator **Metzenbaum**. Let me ask you a question. Would the cable industry be receptive to trying to work with those of us in Congress who think that the fact that cable prices rose at a rate more than 100 percent higher than price hikes for other entertainment, such as movie and theater tickets, last year? That is the Department of Labor's figures. Would you be willing to work with the Congress in attempting to work out a reasonable way of constraining that which many of us think are inordinate price increases?

Mr. **Mooney**. Senator, I do not have the precise figures in my head——

Senator **Metzenbaum**. Just answer the question. Are you interested in negotiating with us, or do we have to see if we can get 51 votes?

Mr. **Mooney**. Well, we are not interested in the Cable Act being altered, and I would like to tell you why.

Senator **Metzenbaum**. Well, you will have to tell me after I return.

Mr. **Mooney**. I think in any event the FCC is required——

Senator **Metzenbaum**. The answer is no?

Mr. **Mooney**. Senator, we are not interested in changing the law at this time, but I think the FCC is required by statute to render a report to Congress on this subject next year, together with whatever legislative——

Senator **Metzenbaum**. I want to tell you, Mr. Mooney, I think that the FCC is not representing the public interest in this area. Therefore, I think Congress has a right and a need to act. So if your answer is no, we will try to move as promptly as we can with respect to legislation.

I would have hoped that the industry might recognize that these unbelievable figures—unbelievable figures about the increased prices that are being paid for cable systems, indicating the fact that there is an unbelievable note of return on the dollar and expectation of increased rates, I would have figured that the cable industry would have taken a more moderate position and said, well, if we can work out something, we would be happy to do so.

Your answer no plays into exactly my concerns, and that is I think I can get 51 votes for this bill in the Senate, and I think I can get 218 votes in the House of Representatives. So I would have hoped that your answer would be a different one. I think it is irresponsible not to be willing to work with us in trying to hold down these rates, to modulate these rates.

Mr. **Mooney**. Senator, I do not want to be on the record as saying something I did not intend. We have traditionally worked very cooperatively with the Congress, with this committee, with other committees of the House and Senate, and have not on any occasion either claimed to be perfect in our performance in the field or attempted to stonewall members of the House and Senate who have expressed legitimate concerns. And we are aware that in a lot of places, cable rates have risen sufficiently quickly to have raised a lot of eyebrows.

The only thing I am trying to suggest here is that deregulation is only 2 years old. There was an awful lot of catching up to do during that period where our rates were effectively frozen in a lot of places. You know, I listened very carefully to what the gentleman from Laredo said, and I think he has got an interesting problem. On the other hand, the rate he cited for 1984, $6 and change, was the average national rate in the cable industry in 1975. I have to say that I think in that place, in 1984 it probably was priced unreasonably low with respect to the service that was being provided.

Senator **Metzenbaum**. The committee will stand in recess.

[Recess.]

Senator **Metzenbaum**. Mr. Mooney you have just inquired of me as to what my earlier question was as to whether you would be willing to work with us in connection with legislation. And I clarified that, and that was my question. And you said the answer no was correct. But then I think you also indicated some confusion as to whether I had inquired of you as to whether you were willing to work with us in connection with keeping rates down, and I think you implied that you would be willing to work with us in that connection.

Mr. **Mooney**. Oh, sure. Of course I would. I have not been shy about acknowledging in public that we obviously have a problem up here in that many members of the House and Senate are concerned about cable rates in some of their communities and concerned about customer service, too. And we try to be always forthcoming in working with members of Congress to help solve those problems, and in a lot of instances, we have helped run some interference, as it were, for members with some of the companies who operate in their States and their districts, including the resolution of misunderstandings.

Obviously, one of the things that has been going on today here is that we have, I guess, a fundamental disagreement with some of the other witnesses as to what the bare facts are and would also like an opportunity to say what we think are the facts and then proceed from there.

Senator **Metzenbaum**. Mr. Mooney, you have stated that there is considerable competition between the cable and the over-the-air broadcasting systems. And you have defended the FCC position that three TV channels are a comparable substitute for the array of programming on basic cable. The Wall Street Journal notes that cable rates rose 20 percent in the first year since deregulation and 14 percent last year. The Department of Labor statistics show that last year cable prices rose at a higher rate than any other commodity—any other commodity—or service in the United States.

If three Grade B television signals really do provide effective competition with cable, then why aren't these steep rate hikes promoting consumers to drop cable and switch to the cheaper competitive substitute?

Mr. **Mooney**. Again, Senator, I think we have some disagreement over the facts. I believe the BLS said that for one month early this year cable rate increases outstretched those for any other commodity, but the following month said that there was a zero increase. I think the BLS figure that I have for the 2-year period is 14.6 percent, 1987 and 1988, the 2 years since deregulation.

As to the three-signal standard, it is my recollection that the legislative history of the 1984 act very clearly reflected Congress's intention that it be an off-air signal standard. Indeed, when the bill passed the Senate, the bill explicitly stated that it was to be four off-air signals. And I think all of the parties to that compromise understood and, indeed, it was stated by the floor managers that this was going to result in deregulation of cable rates. You know, that was not a judgment that was made by the Congress without some disagreement, but it was, nonetheless, the judgment we understood the Congress to have made.

When we get into the FCC, however, we did not just rely on that. We submitted econometric evidence showing that there did seem to be a brake put on cable basic rates where there were three off-air broadcast signals present. And nobody else in that proceeding submitted any econometric evidence to the contrary. Indeed, we were the only ones to present any econometric evidence at all.

As I said before, people are going to get another crack at it when the FCC reconsiders this question next year.

Senator **Metzenbaum**. Well, hopefully, we will preclude that necessity by enacting some legislation. Next year? Why don't they act now, Mr. Mooney?

Mr. **Mooney**. I think they are going to begin the proceeding this year. The statute requires them to report next year, in 1990. The statute specifically——

Senator **Metzenbaum**. But that does not preclude their reporting earlier.

Mr. **Mooney**. I guess it does not.

Senator **Metzenbaum**. I make no bones about it that I think their hearing and their determination has been a farce. I think it has been irresponsible. I do not think you ought to fool with the American people by suggesting that three Grade B TV stations provide effective competition when there is not an American probably in the whole country who does not recognize that every part of the country is served with three TV stations. Do you know of a single area in the country that does not have service of ABC, NBC and CBS?

Mr. **Mooney**. There are some, in the Appalachian States, for example, and there are some in the northwestern States as well. But I grant the point that in most places there are available three off-air signals.

Senator **Metzenbaum**. My last question, Mr. Mooney. You have told us that vertical integration has brought us a wealth of new and diverse programming. Jack Valenti testified that a number of new programming ventures that were in the hopper at studios never got off the ground because the programmers would not give the cable industry a piece of the action. We value independent programmers because they help ensure a diversity of information and entertainment sources. That is good for consumers, and it is consistent with first amendment objectives. So why shouldn't Congress be concerned if the only new programming ventures that get off the ground are those that are owned or controlled by the big cable companies?

Mr. **Mooney**. Well, first, Senator, I do not think it is true that the only new programming ventures that can get off the ground are owned by the big cable companies. You know, three of the five most widely distributed cable programming networks are owned by noncable companies. ESPN is owned by Cap Cities, ABC; USA Network is owned by two Hollywood studios, Paramount and Universal; and the third, CBN, is owned by private interests in Virginia. NBC is about to launch a new service next Monday, and they had their 9 million subscribes they said they needed to launch, even before they did an arrangement, an equity arrangement with Mr. Dolan's Cablevision company—which, incidentally, I do not think they did for carriage reasons. I think they did it to spread their risk.

I think, too, when you listen to complaints from the Hollywood community, one thing to keep in mind is that Hollywood does not think about doing programming like Discovery, which is documentaries, or Nickelodeon, which is for children. Hollywood thinks most about doing the same old thing: sitcoms, action adventure shows. They think that there is an inexhaustible appetite amongst the public for this stuff. Our experience is that people want higher quality, more diversified TV. Yet we have had to put up the money to do these things because nobody else has wanted to.

Senator **Metzenbaum**. Thank you very much, Mr. Mooney. Thank you, Mr. Levin.

Mr. **Levin**. Thank you, Mr. Chairman.

Mr. **Mooney**. Thank you, sir.

Senator **Metzenbaum**. Our next panel consists of Eddie Fritts, president of the National Association of Broadcasters; Preston Padden, president of the Association of Independent Television Stations; Robert Schmidt, president of the Wireless Cable Association; and Janusz Ordover, professor at New York University, Department of Economics, New York, NY.

I apologize to you for keeping you waiting this long. You were here, I guess, and you know what transpired.

I will say to all of you we have the 5-minute rule. Mr. Fritts, please proceed.

STATEMENT OF EDWARD O. FRITTS, PRESIDENT AND CEO, NATIONAL ASSOCIATION OF BROADCASTERS, WASHINGTON, DC; PRESTON R. PADDEN, PRESIDENT, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC., WASHINGTON, DC; ROBERT L. SCHMIDT, PRESIDENT, WIRELESS CABLE ASSOCIATION, WASHINGTON, DC; AND JANUSZ A. ORDOVER, PROFESSOR OF ECONOMICS, NEW YORK UNIVERSITY, NEW YORK, NY

Mr. Fritts. Thank you, Mr. Chairman, and thank you for convening these hearings.

I am here today to talk about the relationship between broadcasting and cable. Sometimes we are the best friends, and we are also unyielding competitors. Some of our members are actively involved in the cable industry, yet locally all TV stations are subject to the whims of cable systems, which dictate when and how an increasing number of Americans will receive what have traditionally been signals from free, over-the-air television stations. We salute cable for their many fine programming services, some of which have been explained this morning. We note, however, that those services compete directly with those we provide for free.

I suppose it is because we are so close to cable that we are uniquely positioned to suggest with some authority that the time has arrived for cable to be reregulated.

Now, let me review the video marketplace.

Senator Metzenbaum. You say reregulated?

Mr. Fritts. Reregulated.

Since 1934, Congress set in place a broadcasting structure that has served our Nation well—local stations licensed to serve the needs and interests of their local communities. The public has enjoyed virtually universal access to a world of diverse information—news and public affairs, entertainment, sports, weather and so forth. This has been provided free of charge every day of the year. Indeed, our system of free, over-the-air broadcasting has become the envy of the world. In fact, many nations around the world are attempting to replicate it.

In 1984, when Congress passed the Cable Act, cable characterized itself as a struggling, infant industry. That act, which, in essence, removed all regulatory oversight, has become the communications equivalent of anabolic steroids. Today, cable television operators enjoy an unregulated monopoly. Amazingly, only 32 of more than 8,000 cable systems have direct competition. As our graph shows, some would say that it is 99.44 percent pure, free of competition. It is not any wonder, then, why the telephone companies are so anxious to duplicate the cable model in video delivery.

Since 1984, the FCC's must-carry rules have twice been eliminated. Cable now has unrestricted discretion over what local stations it will carry and where it will place those stations in the lineup. They even have a compulsory license to retransmit our local stations without our consent and without payment.

Now, that struggling, infant industry of 1984 has grown by leaps and bounds. Today, cable is a $14 billion industry which has systems passing nearly 80 million homes. The biggest of the multiple system operators are fully integrated, and as a measure of the concentration, the top five account for more than 40 percent of all cable subscribers.

Yesterday, the American video consumer enjoyed a wide variety of sports programming free of charge. Soon, New York Yankee games, which are now broadcast free, will only be available on cable. Other sports in other cities are suffering the same fate. We think this trend of siphoning of sports and other programming from free TV to pay TV raises serious questions. Are the rates rising because cable needs to cover the high cost of sports programs, once offered to the consumer free of charge? Or are the sports programs moving from free TV because cable can up the bidding ante, knowing that its rates are not going to be regulated?

Mr. Chairman, broadcasters are fiercely competitive. It is a rare local market that does not have four or more stations vying for the advertising dollar and striving to meet the demands placed upon them by consumers, the Congress, and the FCC. However, the 1984 Act has had the effect of placing the thumb on cable's side of the competitive scale. Other media interests, local governments and consumer groups represented here today share this view. Your constituents and our customers also know that in terms of rising rates, poor service, and the fact that they are paying ever-increasing amounts for service and programs they once received free.

What is the goal of local television stations? We ask Congress to lift that thumb that has caused the imbalance in the competitive scale, to return free, over-the-air broadcasters to the vibrant, competitive marketplace in which we feel most at home.

Right now cable is the ultimate gatekeeper, sitting in judgment of television broadcasters who are committed to providing service to their local communities. These highly integrated monopolies have every incentive to favor their own programming at the expense of free, over-the-air TV stations. They are fully competitive in the race for advertising dollars, and they have even begun to kidnap America's favorite sporting events from free TV.

Congress must begin the process of re-regulation with must-carry and channel repositioning rules. Beyond that, we recognize that you will consider many other concepts which will add to the competitive balance, and we stand ready to offer our views as you begin this process of deciding how best to structure the regulations which will govern the video marketplace of tomorrow.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Fritts follows:]

National Association of
NAB
BROADCASTERS

TESTIMONY OF
EDWARD O. FRITTS
PRESIDENT & CEO
NATIONAL ASSOCIATION OF BROADCASTERS

BEFORE

THE SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS
OF THE SENATE JUDICIARY COMMITTEE

ON

COMPETITIVE ISSUES IN THE CABLE TELEVISION INDUSTRY

APRIL 12, 1989

EXECUTIVE SUMMARY

In 1934, Congress established the free over-the-air broadcasting structure that exists today. It is built upon a foundation of stations licensed to serve the needs and interests of their local communities.

In 1984, Congress passed the Cable Act, to establish cable as a full-fledged communications service and to allow it to grow. Cable has grown, but the Act has resulted in cable becoming an unregulated monopoly.

Cable acts as a gatekeeper to the home. Monopoly systems increasingly are owned by large, integrated conglomerates, which have incentives to favor their programming and disfavor free television programming. Sports programming increasingly is being syphoned from free television to pay television.

To restore fair competition between cable and broadcasting and to prevent our society from being divided into information haves and have nots, Congress should re-regulate cable.

For television broadcasters, the most important step in re-regulating cable is to implement reasonable must carry and channel positioning rules. If these rules are implemented, broadcasters should have no direct interest in whether cable's rates are re-regulated. Deregulation of cable's rates, however, has been based on an effective competition standard that bears no relationship to actual marketplace competition to cable.

From the start, Congress and the FCC have regulated broadcast ownership interests. Congress may wish to consider regulating cable ownership.

I am Eddie Fritts, President and CEO of the National Association of Broadcasters. NAB represents 970 television stations, the major networks, and more than 5100 radio stations. NAB appreciates this opportunity to testify, and commends the Subcommittee for continuing its examination of competitive problems arising out of cable[1].

In 1934, Congress set in place a broadcasting structure that has served our nation well -- local stations licensed to serve the needs and interests of their communities[2]. The public has enjoyed virtually universal access to a world of diverse information -- news and public affairs, entertainment, sports, weather, and so forth -- free of charge every day of the year. Indeed, our system of free, over-the-air broadcasting has become the envy of the world, and many nations are taking steps to replicate it.

Television broadcasting was complemented by the development of cable during the 1950's, 1960's and 1970's. Cable originated as "Community Antenna Television," a means of spreading television reception to unserved or underserved areas. Later, cable developed its own programming to supplement the television signals it retransmitted. Broadcast programming, however, remains the foundation of what cable offers today[3].

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[1] NAB was represented at the Subcommittee's March 17, 1988 hearing on cable competition by Gary R. Chapman, Senior Vice President of Broadcasting, Freedom Newspapers, Inc.. This statement does not attempt to duplicate the arguments made in that earlier testimony, nearly all of which could be repeated with equal validity and vigor today.

[2] The Communications Act of 1934, as amended. See, e.g., 47 U.S.C. Section 307(b).

A number of NAB's member stations are owned by companies that also have cable interests. I will be the first to acknowledge that cable has provided many good things to the American public. For example, cable derives its operating revenues from both advertising and subscriptions, which has allowed the development of more specialized programming than can be provided by broadcasting, which is solely supported by advertising.

In short, cable and broadcasting in many ways are sister industries, as well as vigorous competitors for the time and attention of the American public. What we seek, however, is the opportunity for fair competition.

When Congress passed the Cable Act in 1984[4], cable still was viewed as a struggling, infant industry. Congress intended, in part, to recognize cable as a full-fledged service, to put it on a solid footing and to promote its growth. In that you have succeeded. In November of 1980, 22.6% of American homes subscribed to cable. In November of 1984, days after final passage of the Act, that number had increased to 43%. Today, nearly 55% of American homes subscribe to cable[5].

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[3] The broadcasting (network affiliates, independent stations and public stations) share of total weekly viewing in cable households in 1988 was 78.9%. A.C. Nielsen, November 1988.

[4] The Cable Communications Policy Act of 1984, 47 U.S.C. Section 601, et.seq..

[5] Nielsen Media Research.

Cable's success has not come without cost, however. NAB does not believe Congress intended to let cable be able to trample on competitors, consumers, and local officials in its growth process.

Consider what has occurred during the last five years, including cable's unchecked ability to deny carriage of local broadcast signals and to shift at will those signals it does carry[6], the rapid concentration and integration of cable multi-system operators ("MSO's")[7], deregulation of basic cable rates[8], and the quickening migration of once free programming to basic and pay cable outlets. If the enormous changes of the last five years are an accurate projection of what the next five or ten years will bring, then we think you will agree that we have reason to be alarmed.

NAB's television membership is used to fierce competition, and has thrived upon it. We cannot continue to serve the public as Congress intended for us to do, however, if our competitors enjoy unfair legislative and regulatory advantages.

The thumb has been placed on cable's side of the competitive scales. We know it. Our fellow witnesses, who represent other media interests, know it. Local governments and consumer groups, also represented here today, know it. Your constituents know it, too, because of rising rates, poor service and the fact that more and more they are paying -- more and more -- for programs they used to get for free. Just ask, for example, the Yankee fans in the New York City area how they like the brave new world of video sports[9].

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[6] As Attachment 1 of this testimony demonstrates, broadcast carriage and channel positioning decisions now may be influenced by anti-competitive incentives caused by integration of the cable industry.

[7] Attachment 2 of this statement lists the market shares of the top 20 cable MSO's. In 1985, the top 50 cable companies controlled 70% of all subscribers. Today, only 20 companies control 70% of all subscribers.

[8] For example, in the September 29, 1988 General Accounting Office report to Senator Howard Metzenbaum on cable rate increases in Ohio, the GAO found that basic rates at the surveyed systems had increased an average of 27 percent since 1986.

NAB's message this morning is simple: it is time for Congress to re-regulate the cable industry. By doing so, Congress will restore a fair competitive balance to the local marketplace, and ensure that the free television system you set in place years ago will continue to vigorously serve the public in the next century.

NAB in the past has refrained from calling for re-regulation of our competitors. We do not seek to exaggerate or be overly dramatic in doing so today.

In 1934, Congress heavily regulated broadcasting to ensure competition, and heavily regulated common carriers because they were monopolies. You have maintained vigilant oversight of both industries since then. These approaches could have guided Congressional action 50 year later, since cable has aspects of both broadcast and common carrier communications.

Congress chose a different path in 1984, but you no longer can ignore the fact that the Act has unleashed an unregulated monopoly. Cable at the local level faces no real competition, either from competing cable systems[10] or other broadband media. That is not just the subjective position of a broadcasting industry trade association. Objective media analysts on Wall Street also hold that view[11].

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[9] Beginning in 1991, the Madison Square Garden cable television network has the exclusive rights to 150 Yankee games a year.

Given the present advantages enjoyed by cable, it is no wonder that the telephone industry is so eager to win the right to enter the business under those terms. It also is no surprise that what cable seems to fear most is that the telephone companies will get just that. Only when the shoe is on the other foot, however, does cable warn against the dangers of big, unregulated, vertically-integrated monopolies[12].

As our nation continues to develop an information-oriented society, all of our citizens should be assured ready and fair access to a breadth of information sources. However,if the current unregulated cable model is allowed to persist, we run the risk that our nation may be divided into the haves and the have nots. If free television continues to labor under the burden of unfair competition, the quality and quantity of its service to the public is likely to diminish. Free television may end up serving largely those who do not have access to cable, or those who can not afford it.

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[10] Less than 1% of cable systems face direct competition from other cable systems within their franchise area. Only 32 of the more than 8000 systems nationwide are "overbuilt." Cable TV Franchising Newsletter, Paul Kagan & Associates, Carmel CA, October 1988, p.1.

[11] For example, an investment column in the "Personal Business" section of Business Week noted that cable television operators "...typically enjoy a monopoly, and an unregulated one at that, in their communities." Business Week, August 29, 1988, pg. 84.

[12] In 1988, the Board of the National Cable Television Association approved a temporary dues increase, to build a "war chest" to fight to keep telephone companies out of the cable business. See, Broadcasting, October 3, 1988, at page 29.

What, then, should be done to re-regulate cable? From the perspective of the broadcasting industry, the most significant problem is cable's gatekeeper status. When Congress passed the Cable Act, it did so in recognition of the must carry rules then in place[13].

Since 1984, the FCC's must carry rules have twice been struck down in court, because of challenges by the cable industry[14]. Cable currently has unrestricted discretion over what local stations it will carry, and where it can place those stations within its lineup. Television stations now have no reasonable assurances that they can get access to the local communities they are licensed to serve. Cable has this absolute discretion over carriage even though it enjoys a compulsory license to retransmit our local signals without our consent and without payment.

NAB believes Congress would agree that a local monopoly should not have total control over both its wire to the home and the entire content of what that wire carries. Many Members of Congress already have expressed support for the adoption of constitutionally sound must carry legislation[15].

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[13] The Senate Commerce Committee Report accompanying S.66, an earlier version of the legislation that became the 1984 Cable Act, states the following:

> During the hearings on S.66, the committee heard testimony...about broadcasters' interests with regard to this bill.... (B)roadcasters are concerned about their continued access to their local cable systems, and...stressed the importance of the present "must carry" requirements. The committee believes that this is a legitimate concern. Given the current compulsory licensing scheme for cable systems under the copyright laws, if the "must carry" rules were eliminated, local cable operators might not carry some local broadcast stations, or would be in a position to charge an unreasonable price to let a broadcaster on their systems.
>
> The committee recognizes the importance of local programing and opposes anything that would undercut that service. While the committee believes that the answer to this issue may ultimately be found in the marketplace, under the current regulatory framework and existing copyright law, the committee sees a need to continue the existing "must carry" rules to protect the public interest.

Senate Report No. 98-67, 98th Congress, 1st Session, pp. 11-12.

[14] Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985); Century Communications Corporation v. FCC, 835 F.2d 292 (D.C. Cir. 1987).

For the television industry, must carry and related channel positioning regulations are a must. This is the single most important step Congress can take to re-institute fair competition between cable and broadcasting.

If reasonable must carry and channel positioning rules are established to remove the bottleneck powers of cable, this will lessen many of the broadcasting industry's concerns about the anti-competitive incentives created by cable's horizontal and vertical integration.

Concentration within the broadcasting industry has been tightly restricted by Congress and the FCC. The same cannot be said of cable[16]. Congress should carefully

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[15] Must carry codification legislation has been reintroduced in the 101st Congress. See, e.g., S. 177 (DeConcini) and H.R. 109 (Bryant).

[16] Congress and the FCC have imposed numerous restrictions on ownership of broadcast facilities and programming, to protect against local and national concentration of control of the broadcast media and to ensure that a diversity of views are available to the public over broadcast media. There is no counterpart in cable to many of these rules.

For example, the Communications Act prohibits foreign ownership or control of broadcast licenses. There are no foreign ownership restrictions applied to cable.

The FCC limits the total number of broadcast properties that can be owned within each broadcast service, both nationally and locally. On a national level, the "12 station" rule caps total station ownership. No party may have an interest in more that 12 commercial stations in each service (12 AM, 12 FM and 12 TV stations). Additionally, the rules specify a television cap of 12 stations or a national audience percentage reach of 25%, whichever restriction is reached first. (Ownership can be increased to 14 stations per service, or a 30% television audience reach, if at least 2 of the stations in the respective service are "minority controlled.") Cable has no equivalent nationwide ownership caps.

On the local level, the FCC's duopoly rule prevents a party from owning or having an interest in two or more stations in the same service if the stations' signals would overlap. The FCC's "one-to-a-market" rule consider whether ownership restrictions need to be applied to cable MSO's to address concerns arising from horizontal and vertical integration in that industry.

Finally, if reasonable must carry and channel positioning rules are adopted, the broadcasting industry should have no direct interest in whether cable's rates are re-regulated. If these rules are not implemented, however, there should be some means by which broadcasters can seek redress of cable carriage problems with local franchise officials. Local control over rates would be likely to provide this type of redress process.

NAB offers two additional observations on the rate issue that are relevant to your discussions on re-regulation. First, the "effective competition" test currently is based on a definition that bears absolutely no relationship to today's marketplace realities[17]. It is fallacious to proclaim, as the FCC definition does, that three or more over-the-air television signals, all owned by separate entities, constitute effective competition for a multichannel monopoly, especially when that monopoly is the sole determinant of what signals it will carry.

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prohibits a party from having an interest in both a radio station and a TV station if the stations' signals would overlap. (The FCC permits waivers in the top 25 markets.) Cable has no equivalent restrictions on the number of systems that can be owned within a particular geographical area, or on a national level.

[17] 47 U.S.C. Section 623 prohibits federal or local regulation of a cable system's basic cable rates when that system is subject to "effective competition." The definition of effective competition was left to the FCC. Again, less than 1% of cable systems face direct competition from other cable systems. See footnote 10, supra.

The second observation concerns the syphoning of sports and other programming from free TV to pay TV. It seems to NAB that rate deregulation raises several "chicken or egg" questions: Are rates rising in part because cable needs to cover the high cost of acquiring sports programs once readily available to the public on free TV? Or, are sports programs moving away from free TV because cable can up the ante in the bidding process with the knowledge that its rates are not regulated?

CONCLUSION

Since the Cable Act was passed in 1984, cable's status as a gatekeeper to the nation's homes has been solidified. These monopoly systems more and more are owned by large, conglomerates, which have incentives to favor their programming to the disadvantage of free television services. Sports programming increasingly is being syphoned from free television to pay television.

Congress should not permit cable's unfair regulatory advantages, and their troubling consequences, to continue for another 5 years. Congress should revisit the 1984 Act and impose reasonable re-regulations on the cable industry. Our free television industry, and the American public it serves, are entitled to fair competition.

Attachment I

A SPECIAL REPORT FROM

RESEARCH & PLANNING

THE ECONOMIC IMPACT OF CABLE ON BROADCASTING

NAB
BROADCASTERS
National Association of Broadcasters • 1771 N Street, N.W. • Washington, D.C. 20036-2898

THE ECONOMIC IMPACT OF CABLE ON BROADCASTING

by

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Submitted to
National Association of Broadcasters
May 6, 1988

EXECUTIVE SUMMARY

In the past few years, the cable industry has witnessed many changes. These include:

- o increased basic cable penetration,
- o decreased local station audience shares in cable homes,
- o increased audience shares for national cable network programming,
- o increased cable advertising revenues (both national/local spot and network), which is a high margin revenue stream for local cable systems,
- o increased cable operator vertical integration with respect to ownership and equity participation in national cable program services,
- o increased horizontal integration by cable MSOs, and
- o increased basic cable rates with no apparent impact on basic penetration.

These trends have had a major impact on the manner in which cable companies conduct their businesses, particularly in relation to local broadcasters.

This analysis focuses on the potential impact of cable on television broadcasters in the present regulatory environment in which must carry rules are absent and in which cable operators are permitted to relocate the channel position of over-the-air channels in an unrestricted manner. This analysis also assumes, based upon existing literature and current market conditions, that cable overbuilds will continue to be the exception rather than the rule in most cable markets and that local cable systems will realize very significant growth in their receipt of local television advertising revenues over the next 10 years. Key potential impacts identified include:

Cable operators have an incentive to drop (not add) one or more local independent or smaller market ("most local") duplicate network television stations when they believe that:

(1) This would increase their spot advertising revenues;
(2) This would increase pay subscriptions (and/or reduce the decline in pay subscriptions);
(3) This would increase the network advertising revenues obtained from one or more cable-only program services in which the system's owner (i.e., MSO) has an equity interest; and/or
(4) In order to make room for some type of cable-only program service.

Cable operators have an incentive to relocate the channel position of an over-the-air television station if such a relocation is expected to:

(1) Increase receipt of national/local spot advertising revenues;
(2) Increase receipt of cable network advertising revenues for the system's owner (i.e., an MSO with an equity interest in one or more cable-only program services);
(3) Increase subscribership to premium services; and/or
(4) Increase subscriber retention.

As the programming provided by the national cable program services becomes more similar to the syndicated programming provided by an average over-the-air independent television station, continued carriage of at least some local independent stations will become increasingly unattractive to cable operators.

Given the precarious financial position of many UHF independents, deletion from cable or relocation to a less desirable cable channel location is likely to cause some of these stations to go "dark." Likewise, financing for new UHFs is likely to be severely limited in the absence of a cable carriage agreement.

Introduction

The deregulation which has taken place in the cable television industry over the past 10 years has resulted in a great expansion of channels receivable in the homes of cable subscribers. However, it has also forever changed the way in which many consumers receive television programs. In particular, more than 50 percent of this country's television households now depend on a single entity (i.e., their local cable company) to deliver all of the television channels they receive. Although some of these consumers can still receive their local television signals over-the-air, they are unlikely to do so except during those periods in which their cable service is not working. This means that local television broadcasters must either be carried by the cable systems in their local market or be faced with surviving economically with a potential audience which is 40 to 50 percent less than it would otherwise be.[1]

This paper will focus on the potential economic impact of cable on television broadcasters in a regulatory environment: (1) in which must carry rules are absent, and (2) in which cable operators are permitted to relocate the channel positions of over-the-air channels in an unrestricted manner. This analysis also assumes that cable overbuilds will continue to be the exception rather than the rule in the vast majority of cable markets for the next 10 years[2] and that local cable systems will realize very significant growth in their receipt of local television advertising revenues during this same period.[3]

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[1] See Fournier, Gary. "An Economic Analysis of the Appropriateness of a New "Must-Carry" Rule for Broadcast Stations and Cable Operators." Prepared for National Association of Broadcasters, FCC Docket No. 85-349, January 29, 1986. Fournier outlines the conditions under which cable could be viewed as an essential facility for local television station access to cable subscribers. He also identifies the conditions under which cable operators would have an incentive to vertically foreclose (i.e., not carry) local stations from access to cable.

In order to identify cable's impact on broadcasting, the following issues will be examined: the vertical and horizontal relationship between the cable business and the television broadcasting business with particular emphasis on cable's growth as an advertising medium; the economic incentives present for cable systems to drop independent and network affiliated television stations (in the absence of must carry rules); the economic incentives present to relocate television stations (in the absence of channel relocation rules); the declining differentiation between cable programming and independent station syndicated programming; and the expected economic impact of non-carriage on independent UHF television stations.

Vertical/Horizontal Relationship: Cable vs. Broadcasting

Competitive Relationship between Cable and Television Broadcasting

Fournier's analysis of the relationship between cable operators and local television stations suggests that the relationship is both horizontal and vertical.[4] To say that there is a horizontal relationship between cable and local stations is to say that the products supplied by local stations (i.e., audiences to advertisers and programs to viewers) are substitutes for the products supplied by the local cable system (i.e., audiences to advertisers and programs to viewers). The most visible horizontal impact of cable on local television stations has been to reduce significantly local station audience shares in cable homes.[5] More recently, however, it has become clear that local cable systems are likely to become significant players in the local television advertising market.[6] The implications of this latter development will be discussed below.

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[2] John Mansell of Paul Kagan Associates estimates that 24 to 36 franchised cable systems currently face substantial overbuild competition (not including SMATV competition). In his opinion, an additional 100 to 150 systems face the possibility of overbuild competition in the future. Since there are currently 8,000 U.S. cable systems (1988 Broadcast/Cable Yearbook, at D-3), the vast majority of cable systems do not (and likely will not) face direct competition from another cable company in the next 10 years. See also, Wirth, Michael. Comment on "The Policy of Exclusive Franchising in Cable Television." Journal of Broadcasting & Electronic Media 31:98-101 (1987); and Economic Analysis of Overbuilds, (Washington, DC: Malarkey-Taylor Research), January 1987.

[3] Paul Kagan Associates, as found in Cable TV Facts 88, (New York, NY: Cable Television Advertising Bureau), 1988, at 5.

To say that there is a vertical relationship between local stations and cable means that local television stations depend on local cable systems to distribute their over-the-air signals to cable subscribers. In this situation, local television stations must deal with local cable systems in order to procure a major factor of production (i.e., video signal distribution via cable). If a local station is unable to arrange signal carriage via cable, its prospects for reaching cable households are quite dim. Thus, the relationship here is that of a buyer (local broadcasters) to a seller (the local cable system).[7] In the past, the vertical relationship between local stations and cable has been controlled by the must carry rules and cable's compulsory license. Likewise, the horizontal relationship between these entities was primarily limited to competition for audiences.[8] However, the elimination of the must carry rules and the movement of cable systems into local advertising sales can be expected to impact significantly both the vertical and horizontal relationship between local stations and cable.

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[4] Supra note 1, at 6.

[5] See Wirth, Michael and Bloch, Harry. "The Broadcasters: The Future Role of Local Stations and the Three Networks." in Eli Noam, ed., Video Media Competition: Regulation, Economics and Technology. (New York, NY: Columbia University Press), 1985, at 121-37.

[6] Supra note 3.

[7] There is an additional potentially significant vertical relationship between cable and local stations. In the absence of a compulsory license (which among other things allows cable operators to retransmit local stations free of charge to subscribers) cable operators would be forced to negotiate for the rights to carry local and distant signal stations. However, the existence of cable's compulsory license has eliminated this type of vertical competition between cable and local stations.

From an economic point of view policy makers need not be concerned with the increasing horizontal competition between local stations and cable. The fact that an additional local entity is selling audiences to advertisers simply increases competition in the advertising portion of the local marketplace. However, policy makers may need to be concerned with the fact that this increased horizontal competition may give local cable operators an economic incentive to deny cable carriage to one or more of the local television stations. Thus, the increase in horizontal competition between local television stations and cable also effects the vertical relationship between them.

Increasing Importance of Local Cable Advertising

Local cable advertising is becoming an increasingly important revenue stream for cable operators.[9] Inspection of Table 1 indicates that cable system spot sales (national/local spot) are the most rapidly growing portion of total cable advertising revenues (spot sales plus cable network sales). According to cable industry expert Paul

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[8] Supra note 5.

[9] See Weinschenk, Carl. "Local Ad Sales Come of Age." Cable Marketing. April 1988, at 26-9, 45-6. It is estimated that local system spot revenues accounted for two percent of the average cable system's total revenue in 1987. According to Ken Begwell of Storer Communications's cable division, that percentage will increase to 10% for his cable systems in five years. "Cable 88: fiscally upbeat, governmentally concerned," Broadcasting, May 2, 1988 at 37.

Table 1.
Cable Advertising Estimates: 1980 to 1995 (millions of dollars)

	National/Local Spot	Cable Network	Total Cable
1980	$ 8	$ 50	$ 58
	(13.8%)	(86.2%)	(100%)
1981	17	105	122
	(13.9%)	(86.1%)	(100%)
1982	32	195	227
	(14.1%)	(85.9%)	(100%)
1983	50	331	381
	(13.1%)	(86.9%)	(100%)
1984	86	486	572
	(15.0%)	(85.0%)	(100%)
1985	139	612	751
	(18.5%)	(81.5%)	(100%)
1986	192	740	932
	(20.6%)	(79.4%)	(100%)
1987	264	883	1,147
	(23.0%)	(77.0%)	(100%)
1988	351	1,061	1,412
	(24.9%)	(75.1%)	(100%)
1990	571	1,412	1,983
	(28.8%)	(71.2%)	(100%)
1995	1,358	2,682	4,040
	(33.6%)	(66.4%)	(100%)

Source: Paul Kagan Associates, as found in Cable TV Facts 88. (New York, NY: Cable Television Advertising Bureau), 1988, at 5.

Kagan, system spot sales grew at an average annual compound rate of 37.8 percent from 1985 to 1987. Kagan also estimates that system spot sales will grow at an average annual compound rate of 22.7 percent over the next eight years and will be close to $1.4 billion dollars by 1995.[10]

By contrast, national cable network sales grew at an average annual compound rate of 20.1 percent from 1985 to 1987 and are projected by Kagan to grow at an average annual compound rate of 14.9 percent over the next eight years reaching nearly $2.7 billion dollars by 1995. As a consequence, local cable system spot sales (national plus local spot) are expected to increase from 23 percent of total cable ad dollars in 1987 to 33.6 percent by 1995.

Technology, in the form of greatly improved automated commercial insertion equipment,[11] coupled with local area cable system interconnects (which make it much more cost effective to sell cable advertising across a large number of local cable systems),[12] and with increasing audience shares for national cable network programming has made prospective advertisers sit up and take notice (see Table 2, infra).[13]

The above discussion points to one logical conclusion, cable advertising (both national/local spot and network) is becoming an increasingly meaningful portion of the average cable operator's business. The fact that the incremental revenue obtained from local cable advertising represents a high margin revenue stream (due to the fact that a cable system's programming costs and other non-advertising sales expenses are already covered by monthly subscriber charges),[14] makes it all the more obvious that local cable systems, looking for major new growth areas, are destined to become significant players in the local television advertising marketplace.

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[10] Supra note 3.

[11] See Melamedas, Lenny. "Selecting the Right Ad Insertion System." Cable Marketing, April 1988, at 30-3, 44.

[12] Nationally, there are 86 cable interconnects serving 20.4 million cable subscribers. Cable TV Facts 88, (New York, NY: Cable Television Advertising Bureau), 1988, at 35-7.

[13] "Better Penetration and Service Propel National Spot Cable Sales." Cable Marketing, April 1988, at 8.

Economic Incentives Present for Cable Systems to Drop Existing Television Stations Or to not Add Newly Operational Stations

In general, a cable operator has an incentive to drop a local station, or to not add a newly operational local station, as long as the expected profit obtained from continued (beginning) carriage of that local station is less than the expected profit obtained if the local station was dropped (never added). In the event that a local station is dropped from (or not added to) a local cable system, it may be compelled to pay the cable system or to provide other economic incentives to obtain carriage. The following discussion focuses on situations in which the cable operator would have such such incentives to drop or not add local stations.

Independents

Independent television stations are in the worst position to effect a favorable carriage arrangement with their local cable system. This occurs: because independent station syndicated programming is becoming less distinguishable from cable-only channel programming (e.g., USA Network, etc.); because of cable's importation of superstations such as WTBS and WGN; because of the existence of a compulsory license for cable system carriage of distant signals combined with the lack of syndicated program exclusivity rules; because a large number of these stations operate in the UHF portion of the broadcast spectrum (and are therefore in a weaker economic position, both with respect to their ability to comply with a cable demand for a fee payment or indirectly by needing to provide more desireable and probably more expensive programming to obtain cable carriage); because there appears to be a negative relationship between the number of independents carried by a cable system and premium service penetration;[15] and because of the increasing focus of cable companies on both local and national advertising sales.

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[14] Ozanich, Gary. High Yield Media Credit Review, (New York, NY: Donaldson, Lufkin & Jenrette Securities Corp.), October 1986, at 10.

There are four specific and different incentives which might cause cable operators to drop (not add) one or more local independents. These include:

(1) That cable operators believe that, because subscriber viewing would be shifted to cable-only services, this would increase the local advertising revenues obtained from selling basic cable channel audiences to advertisers;

(2) That a cable MSO believes that this would increase the network advertising revenues obtained from one or more cable-only program services in which the MSO has an equity interest;

(3) That cable operators believe that this would increase pay subscriptions (and/or reduce the decline in pay subscriptions); and/or

(4) That cable operators wish to substitute some type of cable-only program service for a deleted local independent.

1. The advertising revenue incentive. A cable operator has an incentive to stop carrying (not add) a local independent station in the hopes that this will lead to

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[15] See Bloch, Harry and Wirth, Michael. "The Demand for Pay Services on Cable Television." Information Economics and Policy 1:311-32 (1984).

increased local cable advertising revenues, when the cable operator believes that:

- o deletion of (not adding) the local station will increase the audience viewing levels on one or more advertiser supported cable-only channel,
- o deletion of (not adding) the local station will reduce the audience of that station significantly enough to make advertising on cable-only channels more attractive to local advertisers, and
- o the decline in subscription revenues associated with deleting (not adding) a local station, if any, will be more than offset by increased cable advertising revenues.

2. The cable MSO program equity incentive. A cable MSO has an incentive to direct its systems to delete (not add) one or more local independent stations, in order to increase network advertising revenue from any cable-only networks in which the cable MSO has an equity position, when the MSO believes that:

- o this will significantly increase the audience ratings of one or more of the cable networks they own, and
- o the decline in subscription revenues from carrying fewer local independents will be more than offset by increased network cable advertising revenues.

3. The pay subscription incentive. A cable operator has an incentive to delete (not add) a local independent station to increase premium service penetration or

reduce the decline of premium service penetration, when the cable operator believes that:

- o there is a negative relationship between the number of independent stations he/she carries as part of the basic service package and premium service penetration, and
- o the decline in system revenues associated with dropping (failing to add) a local station will be more than offset by the increase in system revenues realized through increased premium service penetration (and/or reduced premium service churn).

4. The cable-only substitute incentive. A cable operator has an incentive to delete (not add) a local independent station to make room for some type of cable-only program service (e.g., CNN, ESPN, Cinemax, Showtime, etc.), when the cable operator believes that:

- o the negative impact on basic cable revenues associated with deleting (failing to add) a local independent is smaller than the expected net revenue lift (basic plus pay subscription revenues plus advertising revenues) associated with substituting some type of cable-only program service, and
- o the cable system's channel shelf space is full.

Network Affiliates

In general, network affiliates are in a better position to effect a favorable carriage arrangement with their local cable system compared to independents. This is because the programming provided by ABC, CBS and NBC, through their affiliates, continues to obtain approximately 50 percent or more of the viewing hours consumers spend with television (see Table 2). Although the viewership data provided in Table 2 shows a definite decline in network affiliate viewership in cable homes, it appears that carriage of at least one station affiliated with each of the major television networks (ABC, CBS and NBC) will continue to be in the best economic interest of most U.S. cable systems in the near term.[16]

However, when two or more duplicate network affiliates (i.e., two ABC affiliates, etc.) are significantly viewed in a particular cable community, a cable operator may have an economic incentive to drop all but one of these stations.[17] The incentive to do so would be that the cable operator is of the belief that:

(1) This would increase his/her local advertising revenue from selling basic cable channel audiences to advertisers;

(2) This would increase the network advertising revenue obtained from national cable networks in which a cable system's owner (i.e., an MSO) holds an equity interest;

(3) This would increase pay subscriptions; and/or

(4) That the cable operator wishes to substitute some type of cable-only program service for the deleted duplicate network station.

[The discussion provided with respect to these incentives relative to local independent stations above holds here as well].

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[16] See for example, Comanor, William and Mitchell, Bridger. "Cable Television and the Impact of Regulation." Bell Journal of Economics and Management Science 2:154-212 (1971); Park, Rolla. "Prospects for Cable in the 100 Largest Television Markets." Bell Journal of Economics and Management Science 3:130-49 (1972); and Noll, Roger, Peck, M. and McGowan, J. Economic Aspects of Television Regulation. (Washington, DC: The Brookings Institution), 1973. More recently see Dunmore, Ken and Bykowsky, M. Cable Television Demand and Its Implications for Cable Copyright. (Boulder, CO: Office of Policy Analysis and Development, National Telecommunications and Information Administration, Department of Commerce), 1982.

[17] Such a situation occurs in a number of adjoining television markets including: Cincinnati/Dayton, Washington, DC/Baltimore, San Francisco/San Jose, etc.

Table 2. Share of Average Hours of Weekly Household TV Usage for Cable and Non-Cable Homes by Source of Program Origination: 1980 to 1987* [Sum of shares may exceed 100% due to multiple set usage].

	Source of Programming			
	Pay Cable	Cable Origination	Network Affils.**	All Other On-Air Stations***
Pay TV Homes				
1980	10.7%	3.6%	59.4%	31.6%
1981	13.4	5.2	55.1	29.2
1982	21.5	7.2	49.6	26.0
1983	15.9	11.5	53.6	25.7
1984	18.3	14.3	51.6	21.9
1985	17.7	14.1	50.2	24.3
1986	15.3	15.8	50.9	25.0
1987	17.6	19.2	47.5	23.0
Basic Cable Homes				
1980	—	2.8%	73.6%	25.3%
1981	—	4.0	72.6	25.5
1982	—	6.1	69.9	25.7
1983	—	9.5	67.7	26.9
1984	—	12.2	65.3	25.4
1985	—	13.8	63.8	26.4
1986	—	16.9	62.5	25.2
1987	—	19.5	56.9	26.8
Non-Cable Homes				
1980	—	—	82.2%	19.5%
1981	—	—	79.9	23.6
1982	—	—	78.6	22.3
1983	—	—	79.9	23.6
1984	—	—	77.0	26.3
1985	—	—	77.5	27.5
1986	—	—	76.9	27.1
1987	—	—	75.3	28.4

Source: Nielsen Television Index, as found in TV Dimensions '88. (New York, NY: Media Dynamics, Inc.), 1988, at 32.

* The viewing estimates provided are for the May sweeps of each year.

** The network affiliate estimates are for ABC, CBS, and NBC affiliates only.

*** The All Other On-Air Stations estimates include: viewing to all independents (local, distant and superstations) as well as to all PBS stations.

In the event that a cable operator were to decide to drop a local (i.e., significantly viewed) duplicate network station, the real question is how would the cable operator determine which of the duplicate network stations to drop? If a cable operator chooses to drop a duplicate network affiliate in hopes of increasing the cable system's local advertising sales, the cable operator could have an incentive to drop the duplicate network affiliate with whom they compete most directly for advertising revenues (in other words, the "most" local duplicate network affiliate). Such a situation would be most likely to occur: if there is a fairly wide disparity in the market sizes in which the duplicate network affiliates operate, if the cable system is located in the smaller market and/or most closely competes with the smaller market affiliate, and if the local cable operator is allowed to "cherry-pick" highly rated local programming (i.e., local news, local sports, etc.) from the deleted network affiliate. Thus, under certain conditions, a smaller market duplicate network affiliate could be vulnerable to deletion even when it constitutes the "most" local of the duplicate affiliate signals.

It is also possible to envision a scenario in which a non-local (non-significantly viewed) network affiliated station (most likely from a major market) could be imported to replace a local station affiliated with the same network in the hope that this would make local cable advertising more attractive by making local affiliate advertising less attractive. Although possible, this sort of "leap frogging" would need to overcome the relatively small copyright costs plus signal importation costs (i.e., microwave costs) connected with such a strategy. [Form 1 and 2 cable systems (i.e., the smaller systems) might be most likely to consider a "leap frogging" strategy since no additional copyright fees would be owed].

Economic Incentives Present for Cable Systems to Reposition Television Stations

In general, cable operators have an incentive to relocate the channel position of an over-the-air television station on a cable system whenever such a channel relocation shifts subscriber viewership to cable-only services and thereby increases the cable system's overall profitability through: increased receipt of local advertising revenues, increased receipt of network advertising revenues (by MSOs with an equity interest in cable-only program services), increased subscribership to premium services and/or increased subscriber retention.[18]

The focus of channel relocations is channels 2 through 13 on the cable. Most program suppliers would prefer to be located on one of these channels since cable systems usually carry the local network affiliates within this channel group (channels 2 through 13). Since most viewers select programs by flipping among adjacent channels, and since the largest amount of viewing is still focused on programming provided by local network affiliates (see Table 2), most broadcast and cable programmers believe that they will achieve higher audience levels by being located on these lower channels.[19] [Among national cable programmers, ESPN and MTV have been the most aggressive with respect to giving cable operators monetary incentives for placement on low-band channels (channels 2 through 13)].[20]

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[18] For channel relocation to increase cable's retention rate, it must result in a perception on the part of the average cable subscriber that the cable service being delivered after channel relocation is of greater value than the cable service being delivered prior to relocation. If a local station is relocated for this reason, the cable operator believes that greater exposure of cable-only services on channels 2 through 13 will result in higher perceived value of cable service on the part of the average subscriber.

[19] See "Cable Operators Begin to Shuffle Channel Lineups." Multichannel News. September 8, 1986, at 78.

[20] Id.

Simply stated, by being located in the channels 2 through 13 group, a broadcast or cable programmer is making it more convenient for audiences to sample their program offerings. This audience lift effect is similar to the attractiveness in a shopping mall for retail outlets to be situated between large department stores on the assumption that being located in such a high traffic area increases the business generated by these smaller retail outlets. Therefore, location can have a profound impact on the audience achieved by broadcast and cable programmers.[21] This is particularly true in cable markets where a comparatively small number of subscribers have cable ready TV sets (for either their primary or secondary sets). This is because cable subscribers must typically pay a monthly fee to rent a channel converter for each non-cable ready set if they wish to receive more than cable channels 2 through 13.[22]

UHF broadcasters who are unable to achieve a uniform "VHF" channel location on all of the cable systems in their market (e.g., being located on channel 12 of every market area cable system), have a strong desire to have cable systems uniformally locate them on the same channel as their on-air position. Being located uniformly "on-channel" greatly simplifies the marketing task of UHF independent stations and reduces audience confusion with respect to program promotion. Cable company repositioning of these stations from a uniform channel will, therefore, disadvantage those stations.

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[21] Id. See also, "Testimony of Gary R. Chapman, Freedom Newspapers, Inc." Hearings on Competitive Issues in the Cable Television Industry. Before the Subcommittee on Antitrust, Monopolies and Business Rights, U.S. Senate Committee on the Judiciary. March 17, 1988, at 11.

[22] See for example, "Joint Petition for Rulemaking to Amend Section 76.62(c) of the Federal Communications Commission's Rules." Association of Independent Television Stations, Inc. and National Association of Public Television Stations. August 6, 1987; and "Testimony of John Siegel, KBHK-TV." Hearings on Competitive Issues in the Cable Television Industry. Before the Subcommittee on Antitrust, Monopolies and Business Rights, U.S. Senate Committee on the Judiciary. March 17, 1988.

Thus, the present policy which allows cable operators to locate over-the-air channels anywhere on the cable they desire may do almost as much harm to a broadcaster's audience as not being carried on cable at all.

Declining Product Differentiation: Independents vs. Cable

Given the fact that cable is a medium of plenty in the sense that its primary business is delivering "variety" to subscribing members of the public, it is legitimate to focus on what set of circumstances might cause a cable operator, in his/her own judgment, to view a local television signal (particularly an independent television signal) as unimportant with respect to the channel mix delivered to its subscribers. In such a situation, it is clear that a cable operator, though not necessarily the viewing public, has determined that the product being delivered by the unwanted local station is not different enough from other cable channel offerings to justify its continued carriage; or, even if the station is different enough, the product is not likely to induce additional customers to subscribe to cable.

As the programs provided by national cable program services have become more similar to the syndicated programming provided by an average over-the-air independent television station, cable operators are likely to view continued carriage of some local independent stations as of marginal value to the cable channel mix.[23] Unless these local independents are able to secure funding to provide syndicated programming which is sufficiently different from both the programming provided by national cable program services (from which local cable companies can derive advertising revenues) and from imported superstations, many of these independents face relocation (from channels 2 through 13 or their on-air channel number) or deletion from cable.

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[23] Supra note 19.

Specific examples of off-network syndicated product being cablecast by national cable programmers include: Cagney and Lacey, Falcon Crest, ~~MacGruder & Loud~~, Jack & Mike (Lifetime) and Murder She Wrote, Miami Vice, Riptide, Mike Hammer, Petrocelli, That Girl, Dragnet (USA). Additionally, USA Network cablecasts first-run syndicated product which is very similar to that provided by an independent station: sports (WWF Prime Time Wrestling, etc.), game shows (Tic Tac Dough, etc.) and soaps (Edge of Night, etc.). Movies are also becoming an increasingly important part of the program mix on both USA and Lifetime. Likewise, off-cable programming, such as Gary Shandling, Double Dare, Bizarre, etc., is being picked-up by over-the-air stations. Therefore, it is clear that the broadcast television program marketplace and the cable television program marketplace are increasingly non-distinguishable, particularly for independent television stations. Often, the only distinction between the programming on cable network channels and independent station programming is the programs aired by independent stations to comply with the public interest requirements mandated by federal law. Notwithstanding, the lack of differentiation between the local independent stations' syndicated programming and national cable program services will make continued carriage of at least some local independent stations increasingly unattractive to cable operators.

Economic Impact of Non-Carriage on Independent UHF Television Stations

Independent UHF television stations constitute the most vulnerable class of over-the-air broadcast stations with respect to cable non-carriage or relocation. This is not only due to the reasons noted above (i.e., significant reduction in viewership and subsequently advertising revenues expected to result from noncarriage or unfavorable relocation), but also because many of these stations are only marginally profitable.

During 1986, the average UHF independent station lost $1.4 million dollars; 25 percent of these stations lost more than $2.5 million dollars and 50 percent lost more than $1.2 million.[24] According to one report, 20 independent television stations are currently under Chapter 11 protection.[25]

The precarious position in which many existing UHF independent stations find themselves raises the very real possibility that a significant number of this country's independent UHF television stations will not be able to survive cable noncarriage or cable channel relocation.[26] Likewise, it has become much more difficult for prospective independent UHF station owners to borrow the money needed to start and operate a new station. Failure to arrange for adequate cable carriage, usually means that no financing is forthcoming.

Should a significant number of UHF independents go "dark" or a significant number of prospective independents never sign-on, the real losers will be those members of the public who do not subscribe to cable (whether by choice, because of economic circumstances or because of location). Loss of one or more over-the-air stations clearly reduces the program choice available to a non-cable household. Since 40 to 50 percent of the potential subscribers in an average area currently choose not to subscribe to cable, it is important for policy makers to consider how a change in communication policy effects the universal service provided by the over-the-air advertiser supported television system.

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[24] By way of contrast, the average VHF independent made a 1986 pre-tax profit of $6.7 million dollars while 25 percent of VHF independents lost more than $1.4 million in 1986. See the 1987 NAB/BFM Television Financial Report.

[25] "Pop Goes the Stations" Channels, January 1988, at 73.

[26] Supra note 14, at 23-4.

Summary and Conclusions

The extent to which cable operators will engage in the behavior identified here depends critically on the degree of market power possessed by cable operators. Recent trends suggest that the likelihood that cable operators will be able to engage in such behavior (should they so choose) has increased over the past two years. Specifically,

- o Basic cable penetration has increased from 46.2 percent (1985) to 51.1 percent (1988).[27]
- o The audience shares of local over-the-air television stations have continued to decline in cable households (see Table 2). For example, the combined network audience share, with respect to average hours of weekly viewing, declined by 5.4 percent from May 1985 to May 1987 (from 50.2% to 47.5%) in pay cable homes and by 10.8percent(from63.8% to 56.9%) in basic cable households.[28]

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[27] A.C. Nielsen Co. Nielsen Station Index, November 1985 and February 1988.

[28] A.C. Nielsen Co. Nielsen Television Index, As found in, TV Dimensions '88. (New York, NY: Media Dynamics, Inc.), at 32. In non-cable homes, combined network audience share declined by 2.8 percent (from 77.5% to 75.3%) during this same time period. It is not possible to provide similar share numbers for local independents since A.C. Nielsen combines the viewing of local independents, local PBS stations and distant independents (including superstations) in its cable vs. non-cable home viewing comparisons.

o The audience shares of cable origination programming have risen dramatically during the last two years. For example, the combined audience share of cable origination programming, with respect to average hours of weekly viewing, increased by 36.2 percent from May 1985 to May 1987 (from 14.1% to 19.2%) in pay cable homes and by 41.3 percent (from 13.8% to 19.5%) in basic cable households.[29]

o Cable advertising revenues have also risen sharply since 1985 (see Table 1). Specifically, national/local spot cable advertising revenues increased a total of 89.9 percent from 1985 to 1987 (from $139 million dollars to $264 million). Likewise, national cable network ad revenues increased a total of 44.3 percent (from $612 million dollars to $883 million).[30]

o Over the past two years cable operator vertical integration with respect to ownership and equity participation in national cable programming has increased significantly. According to Broadcasting, "[C]able operator ownership and equity participation ...have rapidly become the quid pro quo for launching new [cable] services."[31] For example, in announcing its recent purchase of Tempo Cable Channel, NBC stated it planned to sell as much as 49% of the channel to cable operators in an attempt to "lure" them into carrying the channel.[32] According to NCTA's James Mooney, cable system operators have ownership and equity participation in 61 percent of all current and planned cable program networks.[33]

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[29] Id.

[30] Supra note 3.

[31] "Vertical Integration: The Business Behind the Boom in Cable Programming." Broadcasting. November 23, 1987, at 40-2.

[32] The Wall Street Journal, May 4, 1988 at 28.

- o Over the past two years cable operator horizontal mergers has increased significantly. In 1985, the top four firm concentration ratio showed that the top four cable MSOs had attained a 28.2 percent share of the national cable market (with respect to basic cable subscribers).[34] At present, assuming TCI's purchase of Storer goes through, the top four cable MSOs have a 38 percent share of the national cable market.[35]

- o Since basic cable rates were deregulated, cable operators have significantly increased monthly charges for basic service with no apparent impact on basic penetration. Estimates of the increase in the cable industry's annual average basic service rate during the first six months of deregulation (from December 1986 to July 1987) vary from 10.6 percent[36] to 14.6 percent.[37]

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[33] "Statement of James P. Mooney, National Cable Television Association." Cable Oversight Hearings. Before the Subcommittee on Telecommunications and Finance, U.S. House of Representatives Committee on Energy and Commerce. March 30, 1988, at 73.

[34] CableVision, April 7, 1986, at 56-7.

[35] Various issues of CableVision. See also, supra note 32, at 75.

[36] Rate Deregulation: Cable Industry Pricing Changes and Service Expansion in a Deregulated Environment, (Washington, DC: National Cable Television Association), November 1987, at 5. According to this study, an average decline in pay revenue per subscriber (of 2.3 percent) and an average increase in basic service channels (from 27.3 to 28.9 channels) occurred during this time which lessened the impact of the basic service rate increases.

[37] Ordover, Janusz and Braunstein, Yale. "Does Cable Television Really Face Effective Competition?" As found in, "Testimony of Milton Maltz, Malrite Communications Group." Hearings on Competitive Issues in the Cable Television Industry. Before the Subcommittee on Antitrust, Monopolies and Business Rights, U.S. Senate Committee on the Judiciary. March 17, 1988.

Ordover and Braunstein estimate that basic cable rates increased by 23.78

This paper has provided a discussion of the potential economic impact of cable on broadcasting. Key potential impacts include:

- Cable operators have an incentive to drop (not add) one or more local independent or duplicate network television stations when they believe that:
  (1) This would increase the spot advertising revenues obtained from selling basic cable channel audiences to advertisers;
  (2) This would increase pay subscriptions (and/or reduce the decline in pay subscriptions);
  (3) Deletion of a local station will reduce the audience of that station significantly enough to make advertising on cable-only channels more attractive to local advertisers;
  (4) This would increase the network advertising revenues obtained from one or more cable-only program services in which a system's owner (i.e., MSO) has an equity interest; and/or
  (5) In order to make room for some type of cable-only program service.

- Under certain conditions, a smaller market duplicate network affiliate could be vulnerable to deletion by a cable operator even when it constitutes the "most" local of the duplicate affiliate signals.

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percent during the first six months of 1987 among cable systems who increased their rates. During 1986 cable rates increased by 19.98 percent and in 1985 by 13.67 percent among cable systems who increased their rates. Additionally, there was a 71 percent increase in the number of communities in which rates were increased during the first six months of 1987 compared to all of 1986 (968 vs. 566 communities). See Paul Kagan Associates, Cable TV Franchising News Roundup, September 31, 1987, at 2.

- Cable operators have an incentive to relocate the cable channel position of an over-the-air television station if such a relocation is expected to increase the cable system's overall profitability through: increased receipt of national/local spot advertising revenues, increased receipt of cable network advertising revenues (by cable MSOs with an equity interest in cable-only program services), increased subscribership to premium services and/or increased subscriber retention.

- As the programs provided by the national cable program services become more similar to the syndicated programming provided by an average over-the-air independent television station, continued carriage of at least some local independent stations will become increasingly unattractive to cable operators. Local independents face relocation (from channels 2 through 13 or their on-air channel position) or deletion from cable unless they can differentiate their syndicated product from the national cable program services (e.g., USA, Lifetime).

- Given the marginal financial position of many UHF independents, deletion from cable or relocation to an undesirable cable channel location is likely to cause some of these stations to go "dark." Likewise, financing for new UHFs is likely to be severely limited in the absence of a cable carriage agreement.

In sum, the cable industry is having an increasingly negative economic impact on the television broadcasting business. To the extent that policy makers view the co-existence of an over-the-air free local television delivery system with paid forms of television delivery (e.g., cable television) as the most economically efficient and/or socially desirable method of making television programming available to consumers,[38] the issues raised in this analysis should be viewed as significant. In as much as over-the-air local television stations serve as the FCC's only measure of effective competition for cable, it behooves policy makers to provide as level a playing field as possible on which these critical communication technologies can compete.

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[38] See Baldwin, Thomas, Wirth, Michael and Zenaty, Jayne. "The Economics of Per-Program Pay Cable Television." Journal of Broadcasting 22:143-54 (1978).

Attachment II
Top Twenty MSOs Subscribers & Shares of U.S. Market

Rank	Company	No. of Subs.(000s)	% of U.S. Total
1	TCI	8,030	16.4%
2	ATC & Warner	5,603	11.5%
3	ComCast & Storer	2,968	6.1%
4	Continental	2,381	4.9%
5	Cox	1,495	3.1%
6	United	1,288	2.6%
7	Viacom	1,154	2.4%
8	Newhouse	1,138	2.3%
9	Cablevision	1,130	2.3%
10	Jones	1,111	2.3%
TOTAL	1-10	26,298	53.8%
11	Times Mirror	999	2.0%
12	Cablevision	911	1.9%
13	Sammons	849	1.7%
14	Century	792	1.6%
15	Cooke	729	1.5%
16	Adelphia	720	1.5%
17	Falcon	633	1.3%
18	Centel	582	1.2%
19	Telecable	569	1.2%
20	Rogers	548	1.1%

The source for the number of cable subscribers for the various MSOs is *Cable TV Investor*. Paul Kagan & Associates, Carmel, CA, March 21, 1989, pp.8-9.

Senator **Metzenbaum**. Thank you very much, Mr. Fritts.

I think I will hear from all of the witnesses before I ask any questions. Mr. Padden, president of the Association of Independent Television Stations.

STATEMENT OF PRESTON R. PADDEN

Mr. **Padden**. Thank you, Mr. Chairman. I would ask that my written statement be submitted for the record. In light of the late hour, I will try to summarize it just briefly.

Senator **Metzenbaum**. All of the written statements will be included in the record.

Mr. **Padden**. As you are aware, Mr. Chairman, the independent stations are the newest and most vulnerable segment of the broadcast marketplace; as a result, our stations have suffered a disproportionate share of the thousands of instances of being dropped and repositioned by cable systems. We are extremely grateful for your cosponsorship of Senator DeConcini's bill S. 177 that would restore some regulation to that marketplace.

I am sure you will recall Mr. Siegel [1] from San Francisco testified before you last year about the problems he has had. He called me last night to tell me, ironically, that just yesterday TCI repositioned his station in San Francisco for the second time in 2 years. And you raised the question a year ago whether Mr. Siegel would face retribution for the testimony he gave here that day. We certainly do not know whether that is the case, but either he is facing retribution or he is doing a better job of keeping track of the shifts because he certainly is suffering an excessive number of them.

Senator **Metzenbaum**. Is it the fact that in the repositioning each time he winds up with a higher location?

Mr. **Padden**. That is right. And the cable folks are fond of saying that the most any broadcaster ought to have is to have his signal puts on its FCC-given channel number. But it is important to recognize that often not all of the sets connected to the cable can receive those high channel numbers on the cable. So frequently being moved up is the equivalent of being moved off the system with respect to many of the sets in the home.

Senator **Metzenbaum**. As I remember, Mr. Siegel had a station—in what community?

Mr. **Padden**. It is in San Francisco, KBHK, Channel 44. Twenty years ago, they secured carriage on Channel 12 throughout the Bay Area. And since deregulation, he has been shifted all over the lot. These shifts occur 1 or 2 days before the start of a rating period with no notice. The rating services cannot keep track of where the station is and who is watching it. It is a very serious problem. And we appreciate your cosponsorship of S. 177.

We think there are two underlying causes. The monopoly you have been hearing about and the vertical integration is really at the heart of this repositioning problem. You will hear more about the monopoly from other people. I want to speak briefly about the vertical integration.

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[1] John Siegel, president, KBHK-TV, Channel 44, San Francisco.

I would ask that we put in the record this article from yesterday's New York Times, with the headline "NBC Walks Into a Cable Minefield." It very clearly points out that NBC is having difficulty getting its new service on cable because it is deemed to be competitive with program services owned by the cable operators. Ironically, to try and get it on the systems, NBC is signing written agreements promising that it will not try to broaden the scope of this channel into general news because that would be deemed to be competitive with CNN, which is owned by the cable system operators. And for an industry that is so fond, the cable industry, of citing the first amendment to be making NBC promise it will not provide consumers with a second source of cable news, strikes me as grossly inconsistent.

Senator **Metzenbaum**. It should also be pointed out that CNN is about 17 percent owned by Time-Warner.

Mr. **Padden**. Yes, sir.

I would also like to put in the record an article from last weeks Multichannel News. We heard Mr. Mooney say that cable operators have to make these program investments because nobody else will. Well, in addressing financial analysts last week in New York, Dr. Malone, the President of TCI, described the synergy between system ownership and programming ownership, and how the programming ownership primes the pump of system ownership. And he referred to his concern about seeing companies with no real interest in cable TV gaining control of the medium's program networks. That would represent a "leak in the system," he said. And I do not think it makes much sense to talk about people being unwilling to invest when you view them as a leak in the system.

Senator **Metzenbaum**. Both the articles will be included in the record.

[The articles of Mr. Padden follow:]

Business Day

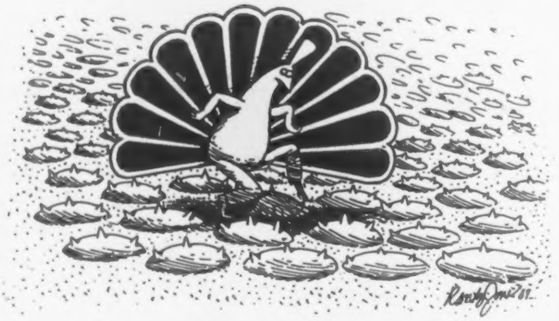
The New York Times

MONDAY, APRIL 10, 1989

Television

NBC Walks Into a Cable Minefield

By BILL CARTER



NBC, the most successful of the broadcast networks, will take the first step toward its stated goal of becoming a major player in the cable industry a week from today with the premiere of CNBC, a 24-hour, consumer-oriented business channel.

But even as it markets the channel to cable operators, NBC is learning that the rules of the cable game are entirely different from those in the broadcast game.

One NBC official, encountering the labyrinth of interlocking cable interests, said last week, "Working in cable is like dealing with the Mob."

NBC's concern, in short, is that some of the cable system operators with interests in competing channels will lock out CNBC.

A Good Beginning

On the surface, CNBC will begin in unusually good shape for a new cable channel. The initial subscriber base of 13 million is the second highest in cable history, topped only by the debut last year of Ted Turner's TNT channel (devoted mainly to old movies). TNT came on line linked to 17 million homes.

NBC likes to say CNBC is the biggest premiere of a channel not owned by major cable operators, pointing out that TNT had built-in access to millions of subscribers based on Mr. Turner's alliances with dominant cable operators like Telecommunications Inc., Time Inc., Warner Communications and Continental Cablevision, all of which have equity interests in Turner Broadcasting.

CNBC should also benefit from the considerable resources of the broadcast network. CNBC has a gleaming new office in Fort Lee, N.J. It will have access to all the information collected by NBC News worldwide.

"On the surface their schedule looks solid," said Larry Gerbrandt, a senior analyst at Paul Kagan Associates, a Carmel, Calif., firm that follows the cable industry. "They're putting a huge amount of resources behind it."

CNBC's start-up cost is an estimated $65 million. Commitments from cable operators will expand the subscriber base to at least 23 million over three years, closer to the 30 million to 32 million that CNBC projects it will need to turn a profit. CNBC will initially receive 7 cents a month per subscriber from each cable system, and will also sell advertising.

CNBC At a Glance

Full Name Consumer News and Business Channel.

Ownership NBC and Cablevision Systems Corp., each with 50 percent.

Programming A 24-hour, consumer-oriented news and information channel, with up-to-the-minute markets reports.

Beginning Date April 17.

Headquarters Fort Lee, N.J.

Initial Subscriber Base 13 million viewers.

Initial Fee 7 cents per subscriber.

Start-Up Cost $65 million (estimated).

President Michael L. Eskridge.

But even with such a strong start, CNBC is not guaranteed success. The main concern, as expressed by NBC officials last week, is the crisscross of alliances between the system operators and channel operators that now make up the cable industry.

"It has become very crowded and very complicated," Mr. Gerbrandt said. "I would describe it as a minefield. It's hard to take a step in the business now without setting off. an explosive reaction."

In CNBC's case, one major explosion has emerged from the mouth of Ted Turner, who quickly declared himself an enemy of NBC's new channel. Mr. Turner dismissed CNBC's business programming as a ruse intended to hide NBC's real purpose: establishing a beachhead in cable from which to take on Mr. Turner's enormously successful Cable News Network.

Mr. Turner thinks NBC wants an all-news cable outlet to help defray the costs of its money-losing news division. One reason for his conviction: NBC tried to buy CNN from him three years ago.

CNBC's president, Michael L. Eskridge, called Mr. Turner's charges "paranoia," and cited the contracts NBC has signed with cable operators promising that the channel will not be for general news.

Arthur Sando, a spokesman for Turner Broadcasting, responded: "What happens when those contracts

. . . OVER

Television

NBC Enters Cable Minefield

Continued From First Business Page

run out? NBC is in place by then. What are the operators going to say if they start introducing a news format? Ted is convinced that that's their intention."

Mr. Sando pointed to the first program announced for CNBC, a talk show hosted by the political commentator John McLaughlin. "What does McLaughlin have to do with business news?" he asked.

The dispute took a more tangible turn two weeks ago when Mr. Turner sought approval from his board to acquire an interest in the Financial News Network, the channel that sees itself as the natural competitive target for CNBC.

The industry interpreted Mr. Turner's move as an attempt to protect himself by insuring the viability of CNBC's prime competitor. NBC saw the potential for some unhealthy pressure on cable systems to stick with FNN instead of CNBC.

Mr. Turner's board did not support the deal, though it might be revived.

The Turner board includes a lineup of entangled interests typical of the cable industry. One of the key members is Telecommunications, the largest cable system operator in the country. It has owned the Tempo network, whose transponder space NBC is leasing as a starting point in its cable initiative.

Two other key members are Time Inc. and Warner, two major system owners that just announced plans to merge. One NBC official, noting some longstanding enmity between Time and NBC's corporate parent, General Electric, said a pending CNBC deal with Warner's cable system fell through shortly after the merger announcement.

NBC is still worried that fear among the system operators of damage to Mr. Turner's investment could hold back the growth of CNBC. "You can get just enough subscribers to bleed to death," an NBC executive said.

The key to success, NBC and industry analysts agree, is a channel that so many viewers want to watch that systems can not lock it out. "The history of the cable industry," Mr. Gerbrandt said, "indicates that channels that succeed with consumers get near universal coverage."

Multichannel News
The Newspaper of the Changing Television Industry
April 3, 1989

TCI '88 Revenues Up 33%; Cash Flow Rises to $888M

NEW YORK — Tele-Communications Inc. last week reported total revenue gains of 33.5 percent in 1988 — to a staggering $2.282 billion, up from $1.709 billion in 1987. Operating cash flow was $888 million, up from $650 million, and pretax earnings were estimated at $93 million, up from $49 million — an 89.8 percent increase.

Before a packed room of institutional investors at the Plaza Hotel here, top TCI executives reviewed the MSO's overall performance in 1988 and provided a forecast for the coming years, plus a strategic look at some of the environmental pressures, both political and economic, that will bear down on TCI and the rest of the cable TV industry in the years ahead.

The size of the gathering showed that TCI — the world's largest cable TV company with more than $8.5 billion in assets, including equity in more than 50 companies — has clearly established itself as

SEE TCI, PAGE 34

TCI '88 Revenues Up 33 Percent;

TELE-COMMUNICATIONS, INC. SUBSCRIBER STATISTICS - DECEMBER 31, (000's)	BASIC SUBSCRIBERS	
CONSOLIDATED ENTITIES	1987	1988
TOTAL TCI MANAGED	3,436	3,648
HERITAGE	554	891
UACI	797	880
TCI DEVELOPMENT	375	394
WSMCA		347
TOTAL CONSOLIDATED	5,162	6,160
NON-CONSOLIDATED ENTITIES		
STORER COMMUNICATIONS, INC.		1,534
UNITED CABLE TELEVISION CORP.	1,009	1,114
DANIELS PARTNERSHIPS		367
LENFEST COMMUNICATIONS, INC.	264	355
TKR CABLE COMPANY	236	270
CENCOM CABLE ASSOCIATES	161	238
TAFT CABLE PARTNERS	186	202
COLUMBIA ASSOCIATES L.P.	117	167
KANSAS CITY CABLE PARTNERS	135	145
HERITAGE PARTNERSHIPS	264	104
OTHER	861	420
TOTAL NON-CONSOLIDATED	3,233	4,916
GRAND TOTAL	8,395	11,076

CONTINUED FROM PAGE 1

one of the most powerful companies in the media business and a force to reckoned with both inside and outside of the cable industry.

TCI now has holdings, either consolidated or non-consolidated, in cable operations serving more than 11 million subscribers. It has created a communications empire (see accompanying chart), where the stock is closely held by three major shareholders, whose cable holdings on a consolidated and non-consolidated basis are the envy of broadcasters and cablecasters alike. With minority stakes in cable TV programming companies, TCI over the past five years has extended its reach far beyond the ownership of cable TV systems.

Established by its founder Bob Magness, now TCI's chairman, the company derived an early reputation as a strong asset builder whose driving force was cable's advantage as a tax shelter and ability to throw off huge amounts of cash. The Cable Act of 1984 paved the way for further growth, and since that time the company has taken off like a rocket under the leadership of president and chief executive officer John Malone.

The company is now in the process of digesting all its acquisitions and is looking to increase its basic penetration and cash flow per subscriber from both consolidated and non-consolidated holdings, executives said last week. During the five years preceding 1988, TCI's basic penetration rate had flattened out at about 58 percent. However, through a series of aggressive price promotions and improved customer service, the rate grew to about 60 percent at the end of 1988, it was noted.

TCI told investors it is still in the market as a buyer, provided the price and market were right, but also intends to expand its existing franchises through construction and a move more aggressively into the backyard dish market through its 80 percent-owned subsidiary Netlink.

Malone said TCI is primarily interested in acquisitions only in those areas that have a direct bearing on its cable holdings or that provide real synergies. The company is now involved in movie theater ownership, through its investment in United Artists Communications, but Malone said he is not certain that owning theaters or movie studios makes economic sense over the long term. He said he doesn't see real synergy between cable systems and the movie business, but rather "coercion" due to risks associated with being forced to distribute box office dissapointments.

Malone runs a tight ship at TCI, where budget is the order of the day and managers adhere to the requirements of those budgeted line items. In fact, actual costs vary very little from budgeted costs, TCI executives said. However, nobody's going to argue against growth: already this year, the company is 40,000 subscribers ahead of initial projections, they noted.

In 1988, the only major varience in the overall budget was due to program expenditures, with TCI citing higher-than-expected license fees. Actual program costs in 1988 were $210 million, TCI said, against a budgeted projection of $195 million.

Still that amount pales when compared with the total 1988 revenues, the lion's share of which — $798 million — was derived from sales of basic cable to subscribers. The basic cable share of TCI's total revenues has grown to 61 percent from 51 percent over the past four years. Pay TV, which had previously been the engine driving the cable TV business, accounted for $371 million in 1988 revenues, according to TCI financial statements. Other highlights of the gathering included:

Operations

J.C. Sparkman, TCI's executive vice president and chief operating officer, outlined TCI's plans for boosting basic cable penetration over the next few years. TCI is first and foremost driven by providing quality programming, not necessarily quantity or more channels, he said.

On a total consolidated basis, TCI ended 1988 with about 4.5 million pay TV units. The company did not break out how many subscribers those units represent, but said the numbers pretty much reflect industry-wide percentages — Home Box Office is the leading brand, followed by Showtime and then a mix of Cinemax, The Disney Channel and The Movie Channel, according to Gary Bracken, vice president and controller.

Sparkman stressed TCI's current systemwide emphasis on customer service, a direction based upon the results of a survey done several years ago which showed the MSO had not performed well in that area. Today, TCI has a policy to require formal customer service training for its representatives, he said.

On a comparative basis, Sparkman said, TCI's basic rates are quite competitive. Systemwide basic rates average $16.95 and the company charges no extra fee for additional outlets. Future basic rate increases will merely reflect changes in the consumer price index, Malone added.

Reorienting itself toward more customer service has obviously paid off.The company averages about $25 per subscriber in revenue, it said. On an annualized cash flow basis, that's about $150 per year, Sparkman added.

TCI is now in the process of hiring additional ad sales reps for its systems, it was noted. Ad revenues are currently running at about $4 a subscriber spread across an ad base that represents about 40 percent of the TCI's wholly-owned operating divisions.

In the future, Sparkman said, local and national advertising revenues will play and important role in offsetting the rising cost of cable programming for TCI and the cable industry as a whole. Sparkman and other TCI executives said the company intends to "breed better programming."

Strategic Planning

John Sie, TCI's senior vice president, strategic planning, cited a number of positive industry trends, such as growth in mature systems and rural areas, and noted some evolving TCI projects.

The MSO, for example, is exploring the viability of two new programming services — one that would appeal to the 24-35 year old demographic group, and another to those aged over 45.

The company is also exploring plans to roll out pay-per-view on a systemwide basis. However, as a prereq-

TCI's X*Press Expands Software Offerings

DENVER — In a move calculated to broaden the value and use of its services and products, TCI-owned X*Press Information Services Ltd. last week announced the successful completion of negotiations with software vendors to distribute both new products and extensions of existing products.

The PC-based cable-delivered service now provides a shopping list of software which can be ordered and delivered electronically to X*Press users.

Among the new stand-alone products are: PC Flight Guide, CareerNet and Aisle Seat Software.

PC Flight Guide searches and displays airline routing between some 200 North American cities, and is updated monthly.

CareerNet offers a computerized Career Information Network, with weekly updates that include more than 1,000 technical, professional and management job descriptions.

Aisle Seat Software is aimed at movie buffs and contains ratings, reviews, box-office figures and Motion Picture Association of America ratings for 1988 and previous years. The database program enables alphabetic, critic score and category sorts.

Specialized software programs, known as X*Pressware, interface with most of the existing spreadsheet and database software programs on the market. These titles include ProQuote, MetaStock Professional and Downloader, Splot and Shadow.

Shadow is a memory-resident program for IBM PCs which saves X*Press stories and quotes to disk and features stock limit alarms. The program also includes utilities for reading the stock file and moving the quotes to spreadsheet, database and word-processing programs.

MetaStock's software collects market data from the Executive service for trendlines, trading bands, spreads and overlays in a multiple window and color environment.

Splot formats market data into stock plots, portfolio value plots, and comparison plots for analysis.

Company president Jerry Bennington said he thinks X*Press' capability to deliver software electronically represents a good opportunity for software shoppers, as well as a new market for cable operators.

"X*Press takes software shopping out of the mall and into your home," he said. "It's another benefit we've added in an ongoing response to our subscribers' needs."■

Cash Flow Rises to $888 Million

uisite, Sie said, TCI requires a national ordering and billing system that is compatible with all its systems. TCI believes PPV makes sense only on a large-scale basis, said Malone. "Divided by 11 million subscribers, it works, but on a system standalone basis, the margins stink." TCI's model for PPV service is that it be event-driven (i.e., boxing).

TCI also intends to increase its presence in the home dish market. Netlink now has a 20 percent market share of the 2.3 million TVRO housholds and is the only company that has rights to offer virtually every cable program network both inside and outside of cable TV franchise areas, the MSO said.

The company is also involved in discussions with GE Americom to obtain transponders on GE's low power Ku-band satellite, K-1, to distribute superstations and other services as a way to lower copyright fees and increase channel capacity.

Sie is also spearheading TCI's activities in new technologies, including high- definition television and lightwave fiber optics, and in forming the MSO's position on telco involvement in the cable business. TCI has been influential in drawing attention away from the alleged benefits of telco entry, and refocusing the spotlight on questioning both the economic prudence and costs of allowing the telcos in and the costs associated with doing so. Conversely, TCI has expressed an interest in reciprocal rights to enter the telephone business should telcos be allowed to enter the cable business.

At the same time, however, TCI is exploring joint projects with several telcos for business applications in downtown areas of its cable franchises where construction is difficult and opportunities for institutional types of service are plentiful.

Programming

As he has done since taking over TCI's programming responsibilities several months ago, Peter Barton, senior vice president, emphasized the need for program cost control, especially in light of an overall increase in TCI programming related costs from $95 million in 1984 to a projected $470 million this year. However, the cost has kept pace with overall sales, and compared to total revenues, the total cost for programming on a percentage basis has declined during that same period, he added.

Based upon the huge consumer appetite for entertainment — subscribers spend upwards of $14 billion on cable services — TCI realizes the huge returns possible by reinvesting funds back into programming. With its subscriber base, it has the leverage to obtain very favorable long-term contracts from its program suppliers. The basic program model, said Barton, is to seek rate stability and predictibility from vendors and to continue to offer any programming as long as it remains popular.

TCI has made it clear it has no qualms about paying higher license fees as long as there is a comparable value attached. Barton called this priming the pump. By investing in programming — through paying higher license fees or making equity investments in networks themselves — the programmers will begin to pump quality fare back to the cable industry.

For example, he noted, Turner Network Television, a service in which TCI has an equity position through its 24 percent interest in Turner Broadcasting System Inc., is projected to reach 60 million subscribers within three years. Assuming monthly subscriber license fees of 50 cents, the network will generate approximately $360 million, he said. Assuming further that it will derive ad revenues of $1.25 per subscriber, the network will generate approximately $1.2 billion, enabling it to outspend the three broadcast networks for programming, Barton said. Malone added that once the programming pump is fully primed, its ability to support itself on ad revenues will have dramatically increased.

Shedding additional light on his program philosophy, Malone expressed a real protectionist view of the cable industry, explaining his concern on seeing companies with no real interest in cable TV gaining control of the medium's program networks. That would represent a "leak" in the system, he said, referring again to his priming-the-pump analogy. Malone said he dreads the thought of paying for programming and then seeing that money leaving the industry.

In the wake of reports on HBO's plans to start a comedy network and a similar plan by a consortium of MSOs — including Cox Cable Communications, Continental Cablevision, Newchannels Corp., and Comcast Cable Communications - and Columbia Pictures, Malone said he was not sure of the viability of all of the plans. "God knows if there is room for one comedy channel," he said.

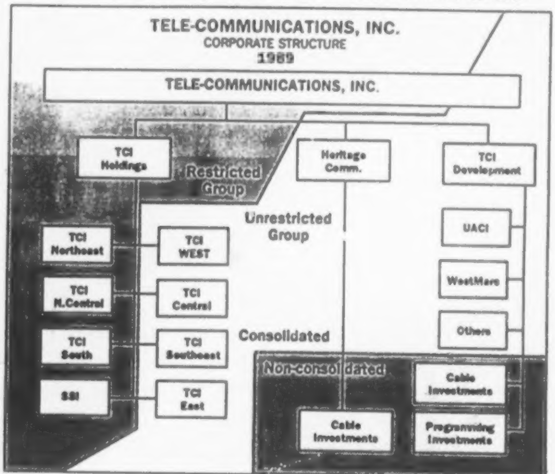
While it is not yet an industry practice, there may come a time when operators demand from program network suppliers rebates or a form of make-goods, similar to those for advertisers in the broadcasting business, in the event programming fails to achieve its objectives. No such system is now in place and Barton said that developing a way to quantify performance, while it would no doubt benefit operators, would be quite difficult to execute.

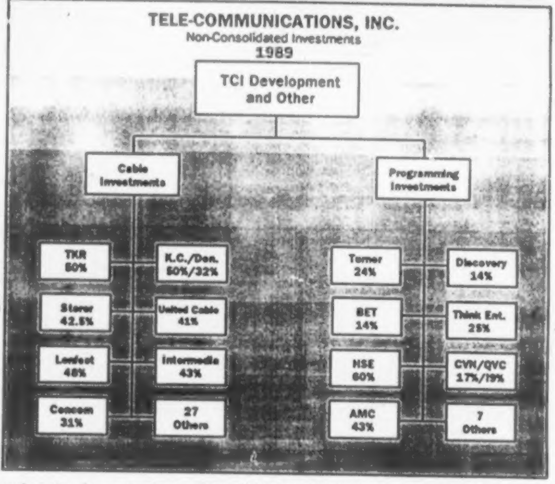
Malone, meanwhile, shared some of his thoughts on the TBS board's decision to abstain from voting on a proposal to acquire Financial News Network. He said TCI had no intention of blocking Ted Turner's way, but cautioned against assuming that cable operators would automatically get behind Turner and in doing so stonewall NBC/Cablevision's new Consumer News & Business Channel. "So rather than help, Turner would hurt" the industry, he added.

Moreover, Malone said TBS would be $250 million deeper in debt, forcing cable companies to cover debt payments for FNN, a service that faces a high degree of risk in a highly competitive market.

When asked about the potential market power of the proposed Time Warner Inc. and the ability of that new venture launching a new basic service to a built-in subscriber base of more than 5 million, Malone cautioned that such leverage also has the ability to backfire. He said the industry today is experiencing change similar in nature to "tectonic plate movements," referring to geological terms that explain the deficiency in the earth's crust.

TCI's stock was up $1-1/8 to $28-3/4 by the end of the afternoon on March 29, the day of its meeting with investors. The day before, following a presentation to bankers, the company's stock rose only 50 cents.■





Mr. **Padden**. In 1974, a White House Cabinet committee, composed of some pretty unradical people like Elliot Richardson, George Romney, Len Garment and Herb Klein looked at this problem, and they issued a report that is appended to our testimony. We would urge your consideration. I would just like to quote one sentence out of this report.

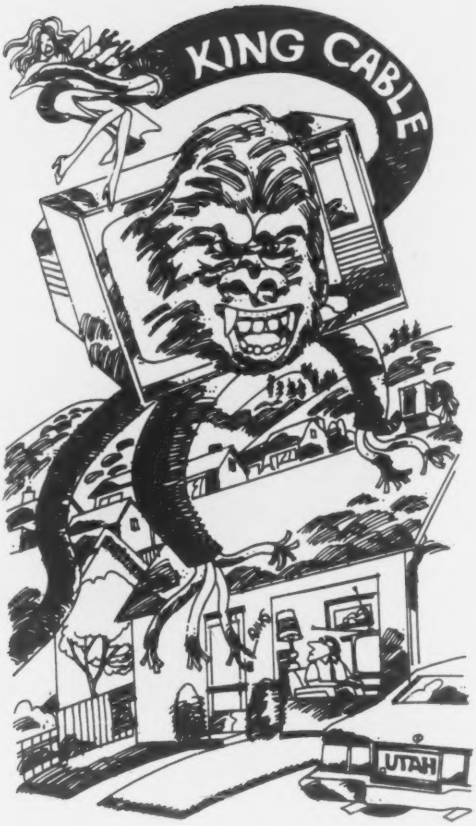
They said, "At the heart of the committee's recommendations is a proposed policy that would separate control of the cable medium from control of the messages on it. The goal of this policy is to assure the development of cable as a communications medium open to all, free of both excessive concentrations of private power and undue Government control."

Well, the Cable Act took care of making sure there would be no undue Government control, but, unfortunately, what it left us with was plainly excessive concentrations of private power.

I also want to mention briefly the string of first amendment cases that the cable industry has used to try and strike down many of the provisions of the Cable Act that were supposed to represent the few remaining controls on the industry. While we are very concerned about the prospect of telco entry into this marketplace, we are also very concerned that this line of first amendment cases may drive all of us to the position very soon where we cannot secure the reregulation of the cable industry.

Thank you very much.

[The prepared statement of Mr. Padden follows:]



Ogden, UT, Standard Examiner, 1/22/89, Page D-1
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Testimony of

PRESTON R. PADDEN

President

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, Inc.

Before The

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

April 12, 1989

Thank you Mr. Chairman. My name is Preston Padden and I am the President of the Association of Independent Television Stations Inc., commonly known as INTV. Our association represents approximately 170 commercial Independent television stations across the country.

I. Introduction: The Interest of Independent Television Stations

The Independent television stations constitute a unique segment of our national communications industry. Our stations are the only commercial source of free, locally-based, non-network information and entertainment video services that are available to all consumers -- rich and poor, rural and urban. Because of the diverse free offerings that our stations provide, the encouragement of local Independent free broadcast stations has long been a cornerstone of our national communications policy.

We are not appearing here this morning for the purpose of gratuitously bashing the cable industry. However, both broadcasters and consumers have very serious problems with cable that can only be resolved by legislation.

When cable witnesses come to Washington to testify in proceedings such as this, they often strike a conciliatory and reasonable posture. For example, last spring Dr. John Malone, Chairman of TCI, the nation's largest cable company, testified before the House Telecommunications Subcommittee. Dr. Malone emphasized that his company "really does not have any difference with the broadcast industry, either network or Independent stations." [1] He reiterated his support for must-carry legislation, asserted that channel shifting had been "a one time occurrence" and stated that the issue of cable channel assignments for UHF Independent stations was "a legitimate public policy issue." (*Ibid*.).

Unfortunately, when the hearings are over and everyone goes back to everyday life, the story changes. Despite the best of intentions by cable trade association executives and industry leaders like Dr. Malone, local Independent television stations continue to suffer anti-competitive conduct at the hands of cable system operators. Last year the FCC conducted the first comprehensive study of cable carriage and channel shifting practices. A copy of the Commission's report is appended as Attachment No. 1 to my testimony. Responses, which were purely voluntary, were received from approximately one half of all cable operators.

In the FCC survey, 869 cable systems admitted denying carriage to 704 local stations in 1,820 different instances. Nine hundred and seventy four systems admitted shifting the channel location of one or more stations yielding almost 3,000 instances of channel shifting. *In almost every instance, the stations dropped or shifted have been replaced by cable program services in which the system operator has a financial interest and/or in which the operator is selling advertising*.

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[1] Cable Television: Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce; House of Representatives, 100th Congress, Second Session, Serial No. 100-195 at pages 422-423.

The FCC Report demonstrates that our difficulties with cable are not limited to a few hoary old anecdotes as cable advocates are pleased to allege. Moreover, these carriage and channel shifting problems continue to occur on an almost daily basis. For example, in February of this year a major Independent station in a major market received a letter from one of the very largest cable companies announcing a re-evaluation of the system's channel line-up. The letter emphasized the value of the "shelf space" the Independent station was occupying on the cable system and demanded a schedule of free advertising on the station as a condition for continued carriage. [2]

On January 1 of this year, the leading Independent station in West Palm Beach was shifted, without any warning, from channel 9 to channel 29 on a major local cable system. Repeated efforts to resolve the issue with the local cable manager, and with senior corporate officials, have proven fruitless. [3]

In December, 1988 KICU-TV in San Francisco, was shifted off of channel 6 to make room for a cable "barker" channel promoting the system operator's proprietary pay-per-view service.

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[2] Curiously, the letter did not emphasize the value to the cable operator of its free compulsory copyright license to sell, for its own account, all of the programming purchased or produced by the local stations.

[3] Local stations shifted to a channel position higher than 13 cannot be received at all on many television receivers. Non-"cable ready" sets that are connected to a cable without a converter box receive via cable only those stations and program services carried on channels 2-13. These conditions frequently exist in apartment buildings, hotels and on second and third sets in private homes (recreation rooms, bedrooms, etc.). Being shifted up is the equivalent of being removed from the system with respect to these television sets.

On January 27 of this year, the TCI system in Millbrea, California, moved three local Independent stations out of the VHF band and replaced them with three cable program services (CNN, American Movie Classics and The Discovery Channel) in which TCI holds substantial equity interest and in which TCI sells advertising availabilities. The stations received no notice of the shifts which occurred just three days prior to the start of the critical February Nielsen and Arbitron rating period. One of the stations commissioned a survey that showed that 20% of Millbrea cable households with "second" TV sets, who could formerly receive the station on those second sets, are no longer able to do so because of the channel shift.

In March of this year, representatives of Continental Cablevision presented a Florida Independent station with a proposed "Carriage Agreement" that tied together the issue of the station's future channel placement with the proposed surrender of the station's contractual program exclusivity rights. Since local stations have no recourse in the face of devastating unilateral channel shifts, the effect, pure and simple, was a demand that the station give up its syndicated exclusivity rights. The FCC giveth, and cable taketh away.

In all of these situations, as in all of the thousands of incidences documented in the FCC's report, local broadcast stations have access neither to competitive alternatives nor to regulatory relief. Their only option is to hunker down and suffer whatever anti-competitive abuse the local monopoly cable operator chooses to dish out.

Our Association counsels all of our members to seek to build constructive working relationships with local cable operators. Many of our member stations now employ a cable relations specialist whose sole or principal function is to try to keep peace with local cable operators. Many of our stations also have joined local cable clubs, hosted local cable functions and provided a variety of incentives and inducements to local cable operators. However, the underlying fact remains that the basic legal relationship between broadcasters and cable operators continues to be an inherently unfair, unbalanced and unstable one-way street. Cable operators continue to enjoy the extraordinary copyright privilege of free use of all of the local broadcaster's programming. No cable operator can ever be denied the use of any local broadcaster's product. On the other hand, broadcasters presently have no rights at all with respect to their treatment by cable operators.

The broadcast industry sat quietly by as the Cable Act of 1984 was enacted. That was a tragic error for which our association readily assumes its full share of blame. It would be an equally tragic mistake if broadcasters were to remain quiet now, as Congress begins to review the unhealthy consequences of its actions in 1984.

II. Cable Television Has Developed As A Monopoly That Is Not Subject To "Effective Competition"

Consumers can be well served, and broadcasters can survive, in a marketplace governed either by competition or by regulation. Unfortunately, what consumers and broadcasters face today is a cable marketplace that is barren of both competition and regulation.

The premise of the 1984 Act was that cable would develop in a competitive environment. Many legislators may have relied upon the promise of the cable industry that,

> "A consumer will a have a couple of choices of cable companies. There will be two cable wires running down the street". 4/

Other legislators likely relied on the anticipation that cable would face competition from emerging new technologies such as direct broadcast satellites.

With the 20/20 vision of hindsight, it is now clear that there is no competition -- no head to head cable competition, and no effective competition from other media. Ninety nine per cent of all cable subscribers are served by a single monopoly cable system. Direct broadcast satellites have not developed in this country and no other technology has gained a foothold in the marketplace. 5/ As a result,

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4/ Thomas Wheeler, President of the National Cable Television Association at Hearings before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, United States Senate, 98th Congress, First Session (February 16-17, 1983), pages 126-167.

5/ While MMDS and DBS have the potential of being competitive services, to date this has not materialized. From past testimony, MMDS operators have been unable to obtain rights to popular satellite delivered services, or have been offered terms far more expensive and onerous than those given to cable operators. The newer technology -- DBS -- seems to be the target of the cable industry in an effort to co-op the business. For example, when TCI purchased Tempo Industries, TCI immediately filed an application with the FCC for permission to operate a DBS satellite.

the fundamental underlying premise of the Cable Act turns out to be in error. Cable is a monopoly. 6/

In candid statements in industry trade publications, cable leaders frequently acknowledge the monopoly character of their distribution systems. 7/ No less an authority than R. E. (Ted) Turner has averred in a Federal Court complaint that cable operators exercise "monopoly power" over "essential facilities". 8/ An empirical study commissioned by the National Cable Television Association found that "cable's significantly lower installation costs and greater channel capacity give it an overwhelming advantage over the likely alternative delivery systems". 9/

The FCC, in one of its least distinguished decisions, concluded that the presence of three grade B over-the-air broadcast television

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6/ Traditional anti-trust analysis, including the HHI, is simply inapplicable to industries such as cable where consumers have a choice of exactly one service provider.

7/ "I'm basically a monopolist. I don't like to admit that in public forums, but I want to be the only guy in that territory to serve cable television services there or sell services to some other people. I think they shouldn't be denied those services, but I want to be in that link...." Marc Nathanson, CEO, Falcon Cable, Cablevision, January 18, 1988 at 36.

8/ Cable News Network Inc. v. Satellite News Channels, Civil Action File No. C83-430A, U.S. District Court, N.D. Ga., Complaint filed Mar. 3, 1983).

9/ Cable and Competing Technologies: A Conjoint Model of Consumer Choice, Executive Summary 1 (Opinion Research Corp., 1984).

signals constituted "effective competition" for basic cable. 10/ The Commission's definitional standard is now widely regarded as being devoid of intellectual, econometric or public policy merit. It has been publicly disavowed by two of the three sitting FCC Commissioners. Even the Department of Justice, which has not exactly been a beehive of enforcement activity with regard to cable industry developments, sharply disagrees with the FCC's "effective competition" decision. In its comments to the FCC, Justice concluded that broadcast signals are not a good substitute for basic cable service. 11/ Justice also concluded that so-called new technologies could not be relied upon, at this point in time, to provide effective competition to cable. (*Id*. at 19).

According to the Department of Justice, the most fundamental flaw in the Commission's definitional approach is that it ignores cable market power derived from the carriage of satellite delivered cable networks and other non-local programming sources. (*Id*. at 28 and 30). According to Justice, focusing solely on broadcast

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10/ INTV's interest in the definition of "effective competition" is unrelated to the issue of cable rate regulation. Rather, INTV's interest stems from the impact on carriage and channel shifting disputes of misdefining the circumstances under which cable systems are deemed to be subject to "effective competition." For example the channel shifting that many Independent stations have suffered, has frequently occurred in conjunction with retiering. Section 625(d) of the Cable Act prohibits retiering by cable systems that do not face "effective competition."

11/ Comments of The United States Department of Justice, MM Docket No. 84-1296 at pg. 18.

stations does not "reflect the economic realities of basic cable service." (Id. at 29). The Department specifically found that "where the cable system offers a relatively large number of basic programming services not otherwise available in the market, the cable system is more likely not subject to effective competition." (Id. at 35). Today, most cable systems offer such an array of services not otherwise available to most consumers.

About a year ago, two distinguished economics professors -- Janusz Ordover of New York University and Yale Braunstein of the University of California at Berkeley -- wrote a paper dealing with the issue of when cable was really subject to effective competition.12/ Their study concluded that "tier meltdown" in the cable industry, an enlargement of the average number of channels, increased horizontal concentration of ownership and increased vertical integration into programming had all contributed to rendering the Commission's definitional standard highly suspect. Professors Ordover and Braunstein specifically found that broadcast television "can't compare" to modern broadband cable from an anti-trust competitive standpoint, and that cable constitutes a "distinct product". 13/

In sum, the fundamental premise of the 1984 Cable Act is in error. Cable has developed as a monopoly that is not subject to effective competition. Neither consumers nor broadcasters have

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12/ "Does Cable Television Really Face Effective Competition?", Janusz A. Ordover and Yale M. Braunstein, appended to the Comments of the Association of Independent Television Stations, Inc. in FCC MM Docket No. 84-1296, December 4, 1987.

13/ Id. at 14.

marketplace substitutes to which they may turn in the face of anti-competitive actions by local cable monopolists.

III. Horizontal Concentration And Vertical Integration Are Undermining The Cable Act's Goals Of Diversity And Competiton.

It seems almost laughable today to realize that the stated "national policy" of the 1984 Cable Act was to "promote competition in cable communications". [47 USC Section 601(6)]. There is no competition in cable. Cable operators do not compete with each other. Each cable company operates in a discrete geographic area enjoying either a *de jure* or a *de facto* monopoly.

To make an already non-competitive situation even worse, horizontal concentration of cable ownership has proceeded at a furious pace since the adoption of the 1984 Act. One single cable company, TCI, now controls access to television for more than 11 million Americans. The revenues collected at TCI's "gatekeeper" toll booth in 1988 totaled a staggering 2.282 Billion Dollars. Two large multi-system owners, United Cable and United Artists Cablevision, are in the process of merging. The merged company will constitute the third largest MSO and will be controlled in turn by TCI.

The Time/Warner merger represents a marriage of the second and the fifth largest MSOs. Appended as Attachment No. 2 to my testimony is a *Business Week* article that describes the market power Time/Warner will yield.

While the industry is concentrating horizontally, cable operators have moved rapidly to integrate vertically into the ownership of some of the program services seeking access to consumers through monopoly cable conduits. Appended as Attachment No. 3 to my testimony are charts graphically depicting the program vertical integration of TCI and Time/Warner. According to the Wall Street Journal (May 4, 1988 at pg.29), "Cable system owners have taken minority equity interest in virtually every new programming channel that has started in the past two years." As a practical matter, it is almost impossible in the present environment to start a new cable program service without surrendering equity to the owners of the monopoly cable conduits. [14]

Because of the trend toward vertical integration, cable operators now have a clear vested interest in the competitive success of some of the programming services seeking access through their conduit. You don't need a Ph.D. in Economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the advantage of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the disadvantage of those services, including local Independent broadcasting stations, in which he does not have an equity position.

As our laws stand today, a telephone company is prohibited from owning a cable system for fear that it might "favor[ing] its

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14/ To launch its new business news service, NBC reportedly paid TCI an estimated 20 Million Dollars to buy or lease Tempo Television -- a cable service whose apparent assets would appear to be negligible. Worse yet, to pacify the cable operator owners of CNN, NBC was required to promise, in its carriage agreements, not to broaden its service from consumer and business news into general news. Multichannel News, December 12, 1988, at 50. It seems inconsistent that an industry so fond of invoking the protection of the First Amendment would make NBC promise not to provide subscribers with an alternative source of general news.

own or affiliated interest as against nonaffiliated interests...." [Section 214 Certificates, 21 FCC 2d 307, 327 (1970)]. And, a broadcast station is prohibited from owning a cable system to prevent it from gaining "a competitive advantage" over other stations. [CATV, 23 FCC 2d 816, 820 (1970)]. But, cable operators are permitted to integrate vertically into programming, and use that integration to gain a competitive advantage over others seeking access through their monopoly conduit.

The anti-competitive potential inherent in common ownership of the cable conduit and program services was clearly recognized in the 1974 "Cable Report to the President" by the Cabinet Committee on Cable Communications. A copy of that report is appended as Attachment No. 4 to my testimony. With startling prescience, The Cabinet Committee (comprised of Elliot Richardson, Leonard Garment, Herb Klein, Peter Peterson, George Romney and Clay Whitehead) expressed its competitive concerns in the following terms:

> "Cable's multi-channel technology, together with the economic imperatives of a medium that is a natural monopoly, could lead to an even greater concentration of power than exists in broadcast television. When a single cable operator has the power to control the programming and information content of all the channels on his system, his monopoly power over the cable medium of expression is nearly absolute."

The solution chosen by the Cabinet Committee was a recommended separations policy. The Committee described its proposal as follows,

> "We recommend adoption of a policy that would separate the ownership and control of cable

> distribution facilities, or the means of communications, from the ownership and control of the programming or other information services carried on the cable channels."

Somehow, the thrust of this compelling report was lost in the rush to pass the Cable Act of 1984. As a result, local broadcasters and consumers now face a vertically integrated monopoly cable industry with a clear incentive to engage in anti-competitive behavior.

The resulting list of horror stories grows almost daily. Jones Intercable has banished USA Network, one of the most popular non-operator owned program services, from its cable systems. Jones replaced USA with Turner Network Television, TNT, a cable program service in which Jones holds an equity interest.

In New York, Cablevision's SportsChannel lost a bidding war with MSG cable network for rights to telecast New York Yankee games. Cablevision responded by banishing MSG from the Cablevision owned systems. As a result, hundreds of thousands of consumers are deprived of the opportunity to watch the Yankees, the Rangers and the Knicks. Appended hereto as Attachment No. 5 to my testimony are Congressional letters of protest and newspaper articles of outrage regarding the Cablevision/MSG mess. The newspaper headlines (which INTV did not write) include the following:

"Cable Firms' Lies Simply Hair-Raising"

"Cable Greed Has Yank Fans In Dark"

"The Curse of Cable"

"'Cable Fools Day'"

"Gov. Cuomo Must Act On Cable Fiasco"
"The Price Of Greed"
"Cable's Grip Chokes Public"
"Congress May Have To Settle Cable Feud"
"Viewers Crusade"
"Cable Reigns Without Rules"

Consumer press attention to the harmful effects of cable deregulation is a nationwide phenomenon. The Portland Oregonian recently editorialized in favor of municipal cable ownership. The artwork on the cover of my testimony was reproduced from the Ogden, Utah Standard Examiner. It was accompanied by the headline "Cable TV Free From Regulation". The consumer unrest detailed in these articles suggests that the Cable Act has not succeeded in fulfilling its goal of enhancing competition and diversity in cable communications, and that the analysis of the 1974 Cabinet Committee Report was right on the money.

Another example of the vertical integration problem can be seen in Manhattan where 50 cable consumers were forced to resort to private litigation under the anti-trust laws to gain access to cable services other than those owned by their local monopoly cable system owner. [New York Citizens Committee On Cable TV v. Manhattan Cable TV, Inc., 651 F.Supp. 802 (D.C.N.Y. 1986)]. Plainly it does not serve the Cable Act's goal of competition and diversity if consumers are unable to again access to program services they wish to view because those services are deemed to be competitive with other services owned by their local monopoly cable operator.

Turner Broadcasting Co. operates four program services (CNN, Headline News, WTBS and TNT), and is the leading supplier of program services to the cable industry. In perhaps the most dramatic example of cable vertical integration, a consortium of the nation's largest cable system operators purchased approximately half of Turner's equity. [15] Thus, Turner presently represents one of the most striking examples of cable system operators integrating vertically back into the ownership of program service suppliers. However, there was a time when Turner was an independent supplier to the cable industry not vertically integrated with cable ownership. And, Turner's CNN had occasion to face competition from another cable news service, Satellite News Channels, that was vertically integrated with cable system ownership.

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[15] Other companies, including broadcasting companies, were fully prepared to contribute equity to the Turner organization. The fact that it was cable system operators who did so, seems more a product of their desire to control the marketing of Turner's program services (and Turner's desire to assure cable carriage of its services), rather than any paucity of other prospective investors.

Cable advocates frequently suggest that the growth of cable program services would not have been possible without operator equity. The Turner history refutes that contention. Moreover, there is evidence that offers of equity investments by program production interests have been rejected. Testimony of Mr. Jack Valenti, President, Motion Picture Association of America, Cable Television: Hearings, supra at 489. Whatever the true history may be on this point, the issue for the Congress is whether a policy of separating content from conduit would best serve competition and diversity in the future.

Turner's reponse was to file a civil anti-trust complaint in Federal Court. [Cable News Network Inc. v. Satellite News Channels, Civil Action File No. C83-430A, U.S. District Court, N.D.GA.] In this complaint, Turner averred the following facts:

> 1. That cable operators maintain "a monopoly of the market for the provision of cable television programming services to cable television subscribers within the geographic area covered by each franchise." (Complaint at 16).
>
> 2. That cable operators exercise "control over a facility that is essential to the provision of cable television programming services to cable television subscribers within the geographic area covered by each franchise." (Ibid).
>
> 3. That cable operators can use their "monopoly power" to give an "affiliated entity" a "competitive advantage" over other program services. (Complaint at 17).
>
> 4. That cable operators' monopoly power and vertical integration create "substantial barriers" to entry by other programming services. (Complaint at 18).
>
> 5. That cable television subscribers "have been and will continue to be adversely affected" by cable monopoly and vertical integration. (Complaint at 19).

Obviously, the Turner organization, now itself highly vertically integrated with cable system operators, would view the issue of vertical integration quite differently today. However, its earlier averments in its Federal Court complaint undoubtedly were truthful and reflect the bleak reality faced by both non-vertically integrated programmers and consumers. 16/

16/ In response to earlier INTV citations to the CNN litigation, Turner has suggested that INTV is criticizing all vertical integration including that which exists within companies such as Fox and Tribune who own Independent television stations. Reply Comments of Turner Broadcasting System Inc. in FCC CC Docket No. 87-266, January 27, 1989. However, Turner is in error.

Vertical integration *per se* is not the evil. The problem lies in vertical integration by a company that enjoys market power and controls "essential facilities" in a particular line of business. Since Independent stations operate in competition with other local stations, they do not exercise market power or constitute "essential facilities". As a result, vertical integration into programming by Independent station operators simply does not pose the same anti-competitive problems inherent in cable vertical integration. It is, after all, Turner's own Federal Court complaint which sets forth the averments that cable system operators exercise "monopoly" power and control "essential facilities".

There is a parallel between the manifest problems arising out of cable vertical integration and the history of anti-trust litigation and financial interest and syndication regulatory provisions with respect to the three national broadcast networks. Both the Department of Justice and the Federal Communications Commission found that the three national broadcast networks exercised market power. Accordingly, the three networks were forced to divest themselves of their program syndication actitivies. To the extent that there is a lack of parallel treatment of program vertical integration by cable operators and by the three dominant national networks, the answer is *not* to eliminate the network regulations but rather to act in a manner consistent with those network regulations to curb vertical integration in the cable industry.

IV. Channel Repositioning Of Local Broadcast Stations Is Caused By Cable Vertical Integration And Should Be Prohibited By The Congress For Anti-trust, Copyright and Communications Policy Reasons

Channel repositioning of local broadcast stations is a special subset of the overall difficulties vertical integration has caused for non-affiliated programmers. Local broadcasters are non-affiliated programmers with a special copyright relationship with the cable operator, and a special communications policy obligation to the communities they are licensed to serve.

In its survey of cable practices, the FCC found that 85% of all channel shifting, according to cable operators themselves, was attributable to "marketing" reasons rather than technical necessity. INTV conducted its own unscientific study of 70 instances of channel shifting on TCI cable systems as reported to our association. In 65 of those 70 instances, the original channel position of the local station was subsequently filled with a program service in which TCI had an equity interest. 17/

Plainly, the vertical integration of cable system operators into programming has produced a profound shift in the very nature of the cable operator's business. Previously, the system operator cared only that consumers subscribed. Now, operators have a vested interest in what consumers elect to watch. Given the opportunity,

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17/ INTV does not mean to suggest that TCI's channel shifting record is worse than other operators. However, TCI *is* planning two new programming services which will gain "shelf space" and channel position at the expense of broadcasters or non-integrated programmers. *Multichannel News*, April 3, 1985 at 34.

it is inevitable that cable operators will use their control of the distribution system to compete unfairly in the programming marketplace to the advantage of their own services and to the disadvantage of competitors including local broadcast stations.

Congress should act to prohibit these channel repositionings for three distinct reasons. The first is anti-trust. It is simply inconsistent with the entire thrust of our anti-trust laws to permit cable operators, who enjoy monopoly power and control "essential facilities", to use that control and those facilities to compete unfairly in the programming marketplace. Local broadcast stations should not be rooted out of long held cable channels just because the system operator has vertically integrated into programming.

The second reason for Congressional action deals with copyright. Congress has conferred upon the cable industry the extraordinary benefit of a compulsory copyright license. This license enables cable operators to take and to sell to consumers all of the programming produced or purchased by local broadcast stations. The cable operator pays nothing for all of this programming which constitutes the most valuable portion of the service which it sells to consumers.

Having conferred this extraordinary privilege upon the cable industry, it seems incumbent upon the Congress to require that cable operators not unfairly abuse local stations. Simple equity and fairness requires that cable operators show some modicum of consideration towards the local broadcasters upon whom the cable operators have built their business.

The third reason for Congressional action is communciations policy. Cable program services are available only to those with the financial ability to pay. By contrast, broadcast stations are the quintessential democratic medium, available equally to rich and poor. As a matter of fundamental communications policy, the pay medium that lives off the free medium should not be permitted to simultaneously undermine that free medium through channel positioning practices.

V. Cable Sytems Have Begun To Siphon Popular Programming From Free Over-The-Air Broadcasting

To the extent that cable provides consumers with new viewing alternatives, it obviously serves the public interest. This is true even if consumers are required to pay for access to those new viewing alternatives. However, when cable becomes a device to require consumers to pay for the very same program events that broadcasting previously made available for free, it is extremely difficult to perceive how consumers' welfare is enhanced.

Like a twentieth century Trojan horse, cable rode into the American living room on the promise of enhanced reception of free over-the-air broadcast programming. Now that cable is safely entrenched in more than half of all American homes, it has set about to remove popular events from free over-the-air broadcasting and place those events instead on pay cable services.

National coverage of NFL games has begun the migration from free broadcasting to pay cable with a package of Sunday night games, including the Pro Bowl, all of which previously were available free to consumers on broadcast stations. Major league baseball's new cable package pre-empts the rights of local free broadcasters on Sunday and Wednesday nights. Local stations are precluded from showing games for which they hold contractual rights, just because these free local games might dilute the audience for the cable monopolist's national game. In addition, the national cable package will flood the market with baseball advertising availabilities thereby undermining the economic base of free baseball telecasts.

At the local level, we see the same clear trend of sports rights packages migrating from free broadcasting to pay cable. Appended to my testimony as Attachment No. 6, is a newspaper advertisement for pay cable telecasts of Mets' games last season. This ad arrogantly ridicules those consumers who cannot afford, or have no access to, cable service by depicting a large table radio under the headline, "If you don't have cable, enjoy watching the Mets game tonight."

In New York, station WPIX has broadcast the New York Yankees games free over-the-air to all consumers for more than 40 years. However, the contract for Yankee television rights beginning in 1991 has been granted to a cable service. The continued availability of free over-the-air Yankee telecasts, the rights to which have already been severely limited by cable purchases, remains very much in doubt as of this date.

It is not difficult to see where this trend is leading us. Some cable executives brazenly predict that consumers will be required to pay to see all major sporting events, including the Super Bowl and the World Series. On the evening of last year's Spinks/Tyson boxing match, which was available on cable pay-per-view, the following news account appeared on a Norfolk, Virginia, television station:

> Announcer: "Cox Cable's Irvine Hill says this fight tonight may be the wave of the future for sports on television"

> Irvine Hill (Cable System Manager): "If you can picture say a Super Bowl, where 50 or 60 million people are watching a Super Bowl on a given Sunday, if you say charged $50 or $60 for that, the numbers are so staggering -- so I just think you -- I just predict that you'll have things like the Super Bowl on pay-per-view in just a few years".
>
> Announcer: "And that sports fans is what some might call progress".

Even if these predictions regarding the Super Bowl and the World Series prove unfounded in the near term, it is absolutely crystal clear that consumers are losing substantial amounts of the free sports broadcast programming that they currently enjoy.

Webster defines a Trojan Horse as "a person, organization or factor that is intended, or likely, to undermine an established institution." Under the current circumstances, I can think of no more apt description of the cable industry vis-a-vis free telecasts of major sporting events.

VI. Cable First Amendment Litigation is Rapidly Undermining Congress's Regulatory Options

The 1984 Cable Act represented a compromise in which cable secured substantial deregulation in return for its acceptance of certain specified obligations. Since the enactment of the Act, various elements of the cable industry (firms large and small, fringe and mainstream), have brought a relentless string of lawsuits challenging those burdens which the industry had assumed in the process of legislative compromise. The most successful litigation tactic to date has been to argue that unwanted regulation constitutes an infringement on the free speech rights of the cable operator. [18] This rapidly developing line of cable First Amendment law poses a clear threat to the Congress's regulatory options with regard to the cable industry in the future.

In the Cable Act compromise, the industry agreed to abide by certain franchise renewal procedures. However, in Group W Cable Inc. v. Santa Cruz, 669 F.Supp. 954, 975-76 (N.D. Cal. 1987), a Federal District Court ruled that the First Amendment prohibits a city, having once franchised a cable system, from ever ordering the system to cease operation. [See also 679 F.Supp. 977, 978 (N.D. Cal. 1988)]. In other words, as a matter of First Amendment law, cable systems have become the business equivalent of perpetual motion. Once started, they can't ever be stopped.

Another key element of the Cable Act compromise was the industry's acceptance of provisions regarding public access and universal service requirements. However, in Century Federal, Inc. v. Palo Alto, No. C-85-2168 (N.D. Cal., Sept. 1, 1987), another Federal Court effectively struck down sections 611, 612 and 621(a)(3) of the Cable Act by ruling that a city's public access, leased access and universal service requirement violated the cable operator's First Amendment right to "speak".

18/ Cable advocates frequently seek to draw analogies to the First Amendment rights of newspapers. However, a more apt analogy for cable would be a newspaper delivery truck.

The linchpin of the Cable Act compromise was the explicit authorization of a 5% franchise fee in section 622 of the Act. However, in Century Federal, Inc. v. Palo Alto, ___ F.Supp. ___ FCC Rulemaking Reports (CCH) paragraph 26,179 (N.D. Cal., Oct. 12, 1988) a Federal Court has found that even a franchise fee violates a cable operator's First Amendment rights. Time Inc.'s ATC, the second largest cable MSO, had sought a similar Federal Court ruling with respect to its franchise fee in Erie, PA. [Erie Telecommunictions, Inc. v. City of Erie, 659 F.Supp. 580 (W.D.Pa. 1987), aff'd on other grounds, 853 F.2d 1084 (3d Cir. 1988)].

Finally, of course, cable operators have succeeded in using First Amendment litigation to twice strike down the FCC's regulations relative to the carriage of local broadcast stations. [Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 106 S.Ct. 2889 (1986); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987)]. Although must-carry provisions were not specifically set forth in the Cable Act, their continued existence was certainly a fundamental premise of the Act.

INTV believes that properly drafted must-carry and channel positioning legislation would pass constitutional muster. However, neither broadcasters nor the Congress can ignore the fact that the cable industry's relentless pursuit of First Amendment litigation, against any form of regulation, may tend to limit our remedial options in the future.

VII. Congress Should Pursue The Following Remedies

A. Congress Should Enact S. 177

Senator DeConcini, along with co-sponsors Senators Metzenbaum, Simon and Pressler, has introduced S. 177 that would condition the continued availability of a cable operator's free compulsory license to retransmit local broadcast signals upon the cable operators voluntary willingness to comply with reasonable must-carry and channel positioning requirements. Cable operators unwilling to comply with these must-carry and channel positioning requirements would be obliged to negotiate normal marketplace copyright agreements for those broadcast signals that they did wish to carry. Since cable operators cannot possibly assert a First Amendment right to a compulsory copyright license, the approach utilized in S. 177 is constructed to avoid any First Amendment impediments.

Passage of S. 177 is the single most effective response the Congress could make to the anti-competitive carriage and channel positioning practices outlined in this testimony. Moreover, the terms of S. 177 are reasonable and fair to the cable industry. The must-carry component of the bill incorporates by reference the FCC's modified rules that were based upon an inter-industry compromise agreement. The channel positioning component merely requires that local stations be carried (1) on the channel position the cable operator had voluntarily selected for that station as of July 1985 (prior to the onset of widespread channel shifting), or (2) on the station's FCC designated channel, at the option of the station.[19]

B. Congress Should Pass Legislation Regarding the Siphoning of Programming From Free Broadcasting to Pay Cable

Mr. Richard Kessel, New York State Director of Consumer Protection, recently observed at a public hearing that the loss of free sports broadcasts has the potential to become the number one consumer issue of the 1990's. The process of siphoning free sporting events to pay cable has already started. Congress should act now, and act decisively, before this gradual but insidious process advances any further.

Appended as Attachment No. 7 to this testimony is a draft bill that would condition the anti-trust exemption for major league baseball teams, and the compulsory copyright license for cable television systems, upon the provision of a fair opportunity to local over-the-air broadcast stations to televise at least 50% of a teams televised games.. This draft bill is offered simply as a "thought starter".

The bill's structure is responsive to those who would argue that the loss of major sporting events to pay cable is "just business".

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[19] A requirement for "on-channel" carriage alone is inadequate because non-cable ready sets without a converter box can receive only channels 2-13 via cable. And, cable operators frequently attach their cable to such sets without installing a converter box.

Neither the anti-trust exemptions that the sports leagues enjoy, nor the compulsory license that the cable industry enjoys, are "just business". At the very least, it would seem that the Congress could insure that special privileges, such as anti-trust exemptions and compulsory copyright licenses, are not utilized to undermine the public's enjoyment of free over-the-air sports broadcasts.

C. Congress Should Adopt a Revised Definition of Cable Effective Competition

Efforts to regulate the monopoly behavior of cable systems will continue to be hampered by the FCC's finding that three over-the-air broadcast signals constitutes "effective competition" to basic cable. The Congress should enact a more meaningful definition of the circumstances under which cable systems truly might face "effective competition". A more meaningful definition would clear the way for appropriate regulatory provisions in those instances where cable does not face "effective competition".

D. Congress Should Repeal Section 621(c) of The Cable Act and/or Direct the FCC to Act Upon INTV's Petition for Inquiry Under Section 612(g) of The Act

Section 621(c) of the Act provides that a cable system may not be regulated as a common carrier or a utility. 20/ Given the

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20/ Paradoxically, cable systems enjoy a statutory right under Section 621(a)(2) of the Act to use rights-of-way and easements reserved for the use of public utilities. In fact, cable systems are the only "First Amendment Speakers" with a federal statutory right to dig up your front lawn.

manner in which the industry is developing, a strong case can be made that cable operators should be regulated as common carriers and that section 621(c) of the Act should be repealed.

Section 612(g) of the Act provides that when certain subscriber thresholds have been passed, the common carrier prohibition in Section 621(c) is no longer operative and the FCC is empowered to adopt such regulations as are necessary to promote diversity in cable communications (*e.g.* some form of common carrier or quasi- common carrier regulation). On December 21, 1988 INTV filed a Petition with the FCC urging the commencement of a formal Inquiry on the Agency's responsbilities under Section 612(g) of the Act. Congress should urge the FCC to initiate the Inquiry requested by INTV.

E. Congress Should Require Divestiture of All Program Investments By Cable System Operators

There is more than enough evidence to demonstrate that the 1974 Cabinet Committee Report was correct and that there should be a clear separation between the ownership of cable systems and the ownership of programming services seeking access through those cable systems. Just as the three dominant national television networks were required to divest their program syndication operations in 1970, cable system operators should be required to divest their vertically integrated programming operations.

F. Congress Should Be Prepared to Consider the Alternative of Telephone Company Provision of Cable Television Service, On a Common Carrier Basis, If the Cable Industry's Relentless First Amendment Litigation Succeeds In Blocking Any Re-regulation of the Industry

INTV has not taken a position with regard to repeal of the telphone/cable crossownership prohibition in the Cable Act. However, if the cable industry's First Amendment litigation ultimately succeeds in precluding any regulatory oversight of cable behavior, then some competitive alternative must be found to assure that consumers have access to diverse sources of video information and entertainment.

Attachment No. 1

CABLE SYSTEM BROADCAST SIGNAL CARRIAGE SURVEY REPORT

A Staff Report by the
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
September 1, 1988

CABLE SYSTEM BROADCAST SIGNAL CARRIAGE SURVEY REPORT

INTRODUCTION

1. This report presents a summary of the data compiled in response to a request from members of Congress to investigate the signal carriage practices of cable systems with respect to broadcast television stations in the absence of mandatory carriage rules. [1]

SURVEY PROCEDURES

2. To comply with this request, the Commission sent survey forms to 8,504 cable systems and 1,356 television stations seeking data regarding three matters: noncarriage of signals that would have had must carry status under the rules in effect prior to July 19, 1985 [2]; repositioning of such signals; and payments for carriage of such signals. [3] Participation in this study was voluntary. The information below is based on the data received from 4,303 cable systems and 912 television stations, representing a return rate of usable questionnaires of 50.6% and 67.3% for these services, respectively. [4]

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[1] *See* letter dated February 19, 1988, addressed to Chairman Dennis Patrick and signed by Senator Ernest Hollings, Senator Daniel Inouye, Congressman John Dingell and Congressman Edward Markey. This letter requested that the Commission submit an initial report by September 1, 1988.

[2] On July 19, 1985, the U.S. Court of Appeals for the District of Columbia Circuit held that the Commission's must carry rules were unconstitutional. *See* *Quincy Cable TV Inc. v. FCC*, 768 F. 2d 1434 (D.C. Cir. 1985) (hereinafter *Quincy*). The pre-*Quincy* must carry rules are included as Appendix C. On August 7, 1986, the Commission adopted a new interim set of must carry rules in response to the *Quincy* decision which were based on a proposal submitted by industry groups. These rules are attached as Appendix D. These rules were subsequently invalidated by the U.S. Court of Appeals for the District of Columbia Circuit. *See* *Century Communications Corp. v. FCC*, No. 86-1683, 835 F. 2d 292 (D.C., December 11, 1987) and Clarification *Order* issued by D.C. Cir. Court regarding *Century Communications Corp. v. FCC*, No. 86-1683, 837 F. 2d 517 (D.C. Cir., January 29, 1988).

[3] The survey forms sent to broadcast television stations and cable television systems are attached as Appendices A and B, respectively.

[4] All of the returned forms are available in the files of the Commission for public inspection and copying.

Editing Procedures

3. All forms were reviewed for completeness. Where information was incomplete or unclear, efforts were made to obtain usable information either through readily available data sources or by contacting respondents for additional information. For example, in cases where a cable operator indicated the call sign of a station, but did not provide the station type, we were able to add the missing data. We also found that some participants included written responses that could be quantified without contacting the participants further. In other instances, we telephoned respondents to obtain clarifications or additional information. However, efforts in this regard were not completely successful, and approximately 1% of the returned questionnaires were not usable due to unclear or incomplete information. Furthermore, due to time limitation, we did not verify the data. Specifically, we were unable to verify the accuracy of data with regard to the must carry status of specific stations, and thereby had to rely on survey participants for the accuracy of the data provided.[5] Thus, in general, unless specifically noted, the data tabulated below reflects the information directly as submitted by the participating cable systems and television stations. All of the forms received are available in the files of the Commission for public inspection and copying.

Data Analysis and Limitations

4. The data provided by broadcast stations and cable systems participating in this study have been tabulated, as described below, to indicate the signal carriage practices of cable systems with respect to television stations that were entitled to carriage under the rules in effect prior to July 19, 1985. While the tables summarize most of the data elements included on the survey forms, some have been excluded, primarily due to insufficient response. In addition, while an attempt has been made to present equivalent tables derived from the broadcast and cable responses, this was not possible in all cases since the questions asked on the two forms were not always identical. Further, it is important to note that direct comparisons of the broadcast station and cable system responses cannot be made because the universe of responding companies differs.

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[5] We wish to point out that we found some stations listed as having must carry status that were readily recognized as inaccuracies (e.g., stations from outside the United States which did not have carriage rights under the rules) and as such were not included in the tabulations. We also note that we received many inquiries regarding the provisions of the pre-Quincy must carry rules which suggests that many of those responding to the survey had an incomplete understanding of the obligations created by those rules.

5. In addition to the tables below, the attached Appendix E consists of three grids depicting raw data that were used to generate some of the information that appears in the associated tables. The grids were developed from surveys returned by cable operators only. Grid 1 represents the number of cable systems that have dropped or denied carriage to one or more television stations by the following categories: the number of stations dropped or denied carriage, the channel capacity of the system, and the subscriber count of the system. The number of incidences of dropped or denied carriage by type of station and type of replacement programming is also displayed on this grid. Grid 2 indicates the number of incidents of repositioning of stations by cable system channel capacity, subscriber count, type of station, whether the station began operation after July 19, 1985, and the cable tier on which the repositioning occurred. Grid 3 displays the number of incidents of payment for carriage or channel position by cable system channel capacity, subscriber count, type of station, whether the station began operation after July 19, 1985, amount or type of payment, and frequency of payment.

6. As with any research design, there are factors that limit the interpretation of the data. As previously mentioned, we did not conduct reliability and validity measures on the data or sample, due to time limitations. Additionally, in survey research a common concern is the notion that those not responding to the survey may represent a specific subset of the sample, thereby building into the survey analysis a particular response bias. In this study the concern of response bias is mitigated by the response rate; a response rate achieved after only one follow-up reminder. Furthermore, respondents appear to have difficulty understanding some of the terms included in the questionnaire. For example, in response to a question requiring identification of a signal as a network affiliate, commercial independent, non-commercial ETV (PBS), or other (i.e., religious specialty, etc.), some respondents identified the Home Shopping Network as fitting into each of these categories. Finally, it is evident that some of the responding parties misunderstood or misapplied the mandatory signal carriage rules. These rules are complex requiring information on market rankings and boundaries (35-mile zones), signal contour locations, and county or community audience survey information.

SUMMARY OF SURVEY RESULTS

Stations Dropped or Denied Carriage

7. Broadcast stations were asked if they had been dropped or denied carriage by cable systems on which they would have been entitled to carriage rights under the must carry rules that were in effect prior to July 19, 1985. In cases of noncarriage, television station respondents were requested to provide identifying information regarding such cable systems and to indicate whether they were a station that began operation after July 19, 1985, that had been denied carriage or a station that commenced operation prior to that date

that had been dropped from cable carriage. [6] The survey form sent to cable systems requested identifying information regarding any broadcast signals that would have been entitled to must carry rights under the rules that existed prior to July 19, 1985 that they have deleted or declined to carry.

8. Table 1 categorizes broadcast station respondents by their station type (i.e., network affiliate, commercial independent, non-commercial ETV, or other). For each station type, the table shows the number of stations that were dropped or denied carriage by one or more cable systems and the number of incidences of stations being dropped or denied carriage. [7] Further, the number of such incidences has been tabulated to indicate instances where stations commencing operation after July 19, 1985, have been denied carriage, stations existing prior to that date have been dropped, and stations that claim that they have never received carriage even though they commenced operation prior to the Quincy decision and thus were entitled to carriage. From the information provided by cable system respondents, Table 2 indicates the number of cable systems that report dropping or denying carriage to one or more of each station type. It also indicates the number of stations of each type that cable systems report dropping or denying carriage and the number of such incidences. Furthermore, the number of incidences has been tabulated to indicate instances where stations have been dropped and where they have been denied carriage.

9. In response to the concerns expressed in the Quincy decision, the Commission adopted a narrower set of carriage rules on August 7, 1986. The questionnaire did not specifically ask for information concerning carriage under these rules. Table 2A attempts to create a subcategory of the data for purposes of comparison with these rules. This table is based on information provided by cable system survey respondents and classifies incidences of stations being dropped or denied carriage by station type. However, in accordance with the provisions of the interim must carry rules adopted on August 7, 1986, all cases where the broadcast station is located more than 50 miles away from the cable system, all commercial signals dropped or denied carriage by systems of less than 21 channels, all duplicating ABC, NBC, and

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[6] In reviewing the forms, we found that there were stations that began operation prior to the Quincy decision that had never been carried by cable systems on which they were entitled to must carry status. Where stations provided information regarding such an occurrence, they were included in a separate category. Stations providing this information, however, were not asked whether they had formally requested carriage as was required under the pre-Quincy rules.

[7] For example, a station that has been dropped by two cable systems is counted once under the number of stations and accounts for two incidences of a station being dropped by cable systems.

CBS network affiliates, and stations readily ascertainable as having insufficient audience levels to meet the "qualified station" definition have been eliminated. For purposes of this table, only ABC, NBC, and CBS stations were treated as network affiliates. PBS stations, where reported as affiliates, were moved to the "non-commercial ETV" column. Univision and Home Shopping Network affiliates were moved to the "other" column. Only the Home Shopping Network stations were readily ascertainable as having insufficient audience to be "qualified" for carriage. Also not deleted were other stations whose audience levels on a community-by-community basis could not be ascertained within the constraints of this study, non-commercial "satellite" signals, or signals subject to interference. Thus, this table is intended to provide only a rough comparison with Table 2. A more complete version would require either a new survey or the independent acquisition of a large amount of additional information.

10. Table 3 is derived from the broadcast station survey forms and shows the number of stations that have been dropped or denied carriage by the number of systems on which such actions have occurred. Table 4 tabulates the reporting cable systems by the number of stations they have deleted or declined to carry.

11. Broadcast stations were asked to provide the following information for any cable system on which they have been dropped or denied carriage: (1) number of subscribers; (2) number of activated channels; and (3) the programming substituted by the cable system for the signal dropped or denied carriage. In many cases, the broadcast station respondents were unable to provide these data. Thus, tables based on the inadequate information provided would have been of little value and are not included herein. However, this type of information was provided by the cable systems and Tables 5 through 8 indicate the incidences of broadcast stations being dropped or deleted by the characteristics of the cable systems. Table 5 tabulates the reporting cable systems by the number of former must carry signals that have been deleted or denied carriage by categories of system channel capacity. Table 6 tabulates this information on the basis of number of subscribers. Table 7 tabulates the incidences of stations being dropped or denied carriage by the distance, in miles, between the station's community and the cable system's headend. Finally, Table 8 indicates the types of signals substituted by cable operators for the stations not being carried.

TABLE 1

STATIONS THAT WERE DROPPED OR DENIED CARRIAGE
(As reported by 912 television stations)

Type of Station	No. of Stations Reporting	No. of Stations Dropped or Denied Carriage	Total Incidences of Drop/Deny Carriage *	A/	B/	C/
Network Affiliate	452	87	269	49	211	9
Commercial Independent	186	83	710	389	270	51
Non-commercial ETV (PBS)	237	80	345	88	234	23
Other (relig., specialty)	37	30	209	122	61	26
Grand Total	912	280	1533	648	776	109

* This column represents the total of columns A, B, and C and is the number of incidences of cable systems dropping or denying carriage of each type of station. Although this column adds to 1,533 individual instances of dropped or denied carriage, there is no way to determine the number of separate cable systems which dropped or denied carriage from the television station survey form.

A/ This column represents the number of incidences of cable systems denying carriage to a station that commenced operation on or after July 19, 1985.

B/ This column represents the number of incidences of systems dropping a station.

C/ This final column indicates the number of incidences where cable systems have denied carriage to stations that began operation prior to July 19, 1985. Although the form did not have a code to acknowledge such a possibility, a number of stations volunteered this information and it is tallied in this column.

TABLE 2

STATIONS THAT WERE DROPPED OR DENIED CARRIAGE
(As reported by 4303 cable systems)

Type of Station Dropped/Denied Carriage	No. of Cable Systems That Dropped/Denied Carriage to One or More Stations *	No. of Stations Dropped or Denied Carriage	Total Incidences of Drop/Deny Carriage	A/	B/
Network Affiliate	380	276	595	336	259
Commercial Independent	316	184	485	150	335
Non-Commercial ETV (PBS)	347	153	463	177	286
Other (relig., specialty)	195	91	277	117	160
Grand Total		704	1820	780	1080

Total number of systems that did not drop or deny carriage to any stations: 3434

Total number of systems that dropped/denied carriage to one or more stations: 869

* This column, if totaled, will exceed the number of cable respondents indicating that they dropped or denied carriage to broadcast stations. Some cable systems dropped or denied carriage to more than one type of signal, therefore, these cable systems are accounted for in more than one row of data.

A/ This column represents the number of incidences of cable systems dropping a station.

B/ This column represents the number of incidences of cable systems denying carriage to a station that commenced operation on or after July 19, 1985.

TABLE 2A

DROP/DENIED CARRIAGE REPORT UNDER AUGUST 7, 1986 INTERIM MUST CARRY RULES *

(As reported by **cable systems**)

Type of Station Dropped/Denied Carriage	Number of Stations	Number of Incidences Dropped/Denied Carriage	A/	B/
Major Network Affiliates	0	0	0	0
Commercial Independent	117	277	91	186
Non-Commercial ETV (PBS)	96	282	134	148
Other (religious, specialty)	66	194	90	104
Grand Total	279	753	315	438

* See paragraph 8 above for explanation of this table.

A/ This column represents the number of incidences of cable systems dropping a station.

B/ This column represents the number of incidences of cable systems denying carriage to a station that commenced operation on or after July 19, 1985.

TABLE 3

NUMBER OF SYSTEMS DROPPING OR DENYING CARRIAGE
(As reported by television stations)

Number of Systems Dropping or Denying Carriage	Number of Stations	Percent of Stations Reporting
0	632	69.3
1	99	10.7
2	42	4.5
3	26	2.9
4	16	1.9
5 or more	97	10.7

Total number of reporting broadcast stations 912

Total number of stations that report being dropped or denied carriage by cable systems 280

TABLE 4

NUMBER OF STATIONS DROPPED OR DENIED CARRIAGE
(As reported by cable systems)

Number of Stations That Were Dropped/Denied Carriage	Number of Cable Systems	Percent of Cable Systems Reporting
0	3434	79.8
1	437	10.2
2	191	4.4
3	128	3.0
4	52	1.2
5 or more	61	1.4

Total number of reporting cable systems 4303

Total number of systems that report dropping or denying carriage to television stations 869

TABLE 5

DROP/DENIED CARRIAGE REPORT BY CHANNEL CAPACITY
(As reported by cable systems)

Number of Stations Dropped/ Denied	Number of Cable Systems	Channel Capacity of Cable System					
		Not Reported	1-12	13-20	21-35	36-54	55+
0	3434	55	487	786	1669	382	55
1	437	7	18	37	290	81	4
2	191	3	6	26	107	48	1
3	128	0	8	14	76	30	0
4	52	0	3	6	31	10	2
5 or more	61	0	3	7	34	16	1

TABLE 6

DROP/DENIED CARRIAGE REPORT BY SYSTEM SIZE (NUMBER OF SUBSCRIBERS)
(As reported by cable systems)

Number of Stations Dropped/ Denied	Number of Cable Systems	Number of Subscribers (000)						
		Not Reported	<1	1<2.5	2.5<5	5<10	10<25	25+
0	3434	130	1442	609	404	325	315	209
1	437	4	82	93	59	71	90	38
2	191	6	41	34	34	35	24	17
3	128	5	0	26	20	17	18	17
4	52	0	8	10	8	7	12	7
5 or more	61	0	14	15	2	4	14	12

TABLE 7

DROP/DENIED CARRIAGE REPORT BY DISTANCE BETWEEN STATION COMMUNITY OF LICENSE AND SYSTEM HEADEND

(As reported by 869 cable systems)

Type of Station Dropped/Denied Carriage	Number of Incidences Dropped/Denied Carriage	Number of Incidences of Drop/Denied Carriage			
		Number of Miles			
		Not Reported	1-35	36-50	51+
Commercial Network Affiliate	595	8	76	132	379
Commercial Independent	485	8	240	138	99
Non-Commercial ETV (PBS)	463	7	143	157	156
Other (religious, specialty)	277	0	186	64	27
Total Incidences of Dropped/Denied Carriage	1820	23	645	491	661

TABLE 8

DROPPED/DENIED CARRIAGE SIGNAL REPORT BY TYPE OF SUBSTITUTE PROGRAMMING

(As reported by 869 cable systems)

Type of Substitute Programming	Number of Incidences Drop/Deny Carriage	Number of Incidences Drop Carriage	Number of Incidences Deny Carriage
Not Reported	585	74	511
Local Commercial Station	69	62	7
Local Non-Commercial Station	57	52	5
Distant Broadcast Signal	34	31	3
Basic Cable Network	462	442	20
Pay Cable Channel	36	34	2
Satellite (Superstation)	26	26	0
Scroll or Text Information	11	11	0
Other	24	21	3
No Replacement	516	27	489
Total Incidences	1820	780	1040

Stations Repositioned

12. Television station survey participants were asked whether their signals had been repositioned, i.e., carried on a channel other than that on which it broadcasts, by any cable system on which it would have been entitled to carriage under the must carry rules that were in effect prior to July 19, 1985. Cable systems were requested to indicate whether they had repositioned any signal entitled to carriage under the pre-Quincy must carry rules.

13. Table 9 divides the broadcast stations that indicate that they have been repositioned by type (i.e., network affiliate, commercial independent, non-commercial ETV, or other). For each station type, the table shows the number of stations responding to the survey, the number of stations [8] that have been repositioned, and the number of incidences of repositioning. [9] Table 10 indicates the number of signals previously qualifying for must carry status that cable systems report having repositioned. For each station type, the table shows the number of cable systems that have repositioned one or more stations of that type, the number of stations that have been repositioned, and the number of incidences of repositioning. Tables 11 and 12 tabulate the stations that were repositioned by station type and the cable system service tier of their current channel positions, as reported by television station and cable system respondents, respectively.

14. Finally, cable operators that have repositioned signals were asked to provide their reasons for taking such action. Broadcasters were not asked to provide the same information because it was assumed that it would be unlikely that they would know the reasons they had been repositioned. The information provided by cable respondents regarding their reasons for repositioning broadcast signals can be divided into two categories -- marketing decisions and technical reasons. Table 13 summarizes their various responses within these two categories and indicates the frequency of each response as a percent of the reasons for repositioning provided by cable survey participants.

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[8] A television station that has been repositioned is counted only once no matter how many times it has been repositioned. That is, a station that has been reposititioned by more than one cable system counts as one entry in this table, the same as a station that has been repositioned by only one system.

[9] That is, a television station that has been repositioned on three separate cable systems would represent one repositioned station and three incidences of repositioning on this table.

TABLE 9

TELEVISION STATIONS REPOSITIONED BY STATION TYPE
(As reported by television stations)

Type of Station	No. of Stations Reporting	No. of Stations Repositioned	Total Incidences of Repositioning *
Network Affiliate	452	131	343
Commercial Independent	186	82	475
Non-commercial ETV (PBS)	237	88	417
Other (relig., specialty)	37	12	39
Grand Total	912	313	1274

* This column represents the total number of incidences of cable systems repositioning each type of station. Although this column adds to 1,274 individual incidences of repositioning, there is no way to determine the number of separate cable systems which repositioned broadcast signals from the television station survey form.

TABLE 10

TELEVISION STATIONS REPOSITIONED BY STATION TYPE
(As reported by cable systems)

Type of Stations Repositioned	Number of Cable Systems That Repositioned One or More *	No. of Stations Repositioned	Total Incidences of Repositioning
Commercial Network Affiliate	504	398	946
Commercial Independent	549	236	916
Non-Commercial ETV (PBS)	432	182	541
Other (religious, specialty)	83	41	92
Total		857	2495

Total number of reporting cable systems: 4303

Total number of cable systems reporting repositioning: 974

* This column, if totaled, will exceed the number of cable systems reporting that they have repositioned broadcast stations. Some cable systems repositioned more than one type of signal, therefore, these cable systems are accounted for in more than one row of the table.

TABLE 11

TELEVISION STATIONS REPOSITIONED BY REPORTED TIER
(As reported by 313 television stations)

Type of Station Repositioned	Number of incidences of repositioning of stations:			
	On Basic Tier	Not on Basic Tier	Not Reported	
Commercial Network Affiliate	285	34	24	
Commercial Independent	416	49	10	
Non-Commercial ETV (PBS)	304	65	48	
Other (religious, specialty)	28	10	1	
Total	1033	158	83	= 1274 Incidences of Repositioning

TABLE 12

TELEVISION STATIONS REPOSITIONED BY REPORTED TIER
(As reported by 974 cable systems)

Type of Stations Repositioned	On Basic Tier	Not on Basic Tier	Not Reported	
	Number of incidences of repositioning of stations:			
Commercial Network Affiliate	937	4	5	
Commercial Independent	899	13	4	
Non-Commercial ETV (PBS)	531	8	2	
Other (religious, specialty)	89	3	0	
Total	2456	28	11	= 2495 Incidences of Repositioning

TABLE 13

REASONS FOR REPOSITIONING

(Based on a sample of approximately 600 incidences
of repositioning as reported by cable systems)

Reason	Share of Responses
A. Marketing Decisions	85 %
1. To place a station on the same channel number as its over-the-air broadcast channel	21 %
2. To diversify channel line-up and unspecified "marketing decision"	14 %
3. To achieve common channel alignment on co-owned systems or to conform to a regional channel line-up with other cable systems	10 %
4. General channel realignment and customer convenience	9 %
5. To separate duplicate network signals that are within close proximity	3 %
6. "Tier meltdown" *	3 %
7. Station not entitled to on-channel carriage according to cable operator	3 %
8. Miscellaneous marketing decision **	26 %
B. Technical Reasons	15 %
1. Due to the expansion of the channel capacity of the cable system	5 %
2. Technical reasons occurring as a result of off-the-air interference from a local signal	3 %
3. To move off aeronautical channels	3 %
4. Part-time stations became full-time stations such that two channels are now needed where one previously sufficed	1 %
5. Technical reasons relating to the scrambling of pay channels	1 %
6. Miscellaneous technical reasons **	2 %

* "Tier meltdown" refers to the combining of several tiers into one, thereby changing the configuration of services offered.

** No single reason accounts for more than 1 %.

Payments or Considerations for Carriage

15. We sought information regarding monetary payments or other considerations made by broadcasters to cable systems on which they formerly were entitled to must carry status for carriage of their signals or for a desired channel position. Broadcasters making such payments to cable systems were asked to identify the relevant cable systems and to indicate the dollar amount, where applicable, or type of payment. Cable operators providing responses regarding payments made or other considerations rendered by broadcast stations either for carriage or for channel position were asked to identify affected station, whether the payment/consideration was for carriage or channel position, and the dollar amount or type of payment. Both questionnaires specified possible considerations, other than monetary forms of payment, such as advertising time, production assistance, equipment, and advertising sales. We also asked respondents to indicate whether the payment/consideration was on an annual basis, one time only, or on some other basis.

16. Where the type of payment/consideration or its basis was something other than that specified on the form, we asked the responding broadcaster or cable operator to provide additional information. Other types of payment for carriage or channel position indicated include payment for new channel cards, payment for new equipment and/or for the labor costs associated with the new equipment, payment for copyright liability [10] and fees charged per subscriber. Payments, based on other than a per year or single payment, include monthly or quarterly payments, use of equipment in lieu of payment, covering the costs of printing new channel guides and notification of subscribers. Charitable grants or contributions to hospitals or colleges were also used as bases for payment. We also observe that a number of cable system respondents indicated that stations offered to pay for carriage or channel position but the systems declined the offers. Further, a few systems indicated that they had requested payment for carriage or channel position, but the stations declined to pay.

17. Table 14 summarizes the information provided by broadcast stations concerning payments or other considerations rendered for cable carriage or channel position by amount or type of payment/consideration and the basis of such payments/considerations. Table 15 details similar information regarding payments or considerations received by cable systems from broadcast stations for carriage or channel position.

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[10] It is unclear what copyright liabilities cable systems are incurring from carriage of such signals since the former must carry signals were not subject to such payments.

TABLE 14

BROADCAST STATION PAYMENTS/CONSIDERATIONS
(As reported by 65 television stations)

Amount or Type of Payment	Number of Payments/ Considerations	Per Year	Single Payment	Other
1 $1 - $5000	95	65	30	0
2 $5001 - $15,000	28	17	11	0
3 $15,001 - $25,000	3	2	0	1
4 $25,001 - $35,000	1	1	0	0
5 $35,001 - $45,000	1	0	0	1
6 Above $45,000	2	2	0	0
7 Advertising Time	12	5	6	1
8 Production Assistance	1	0	1	0
9 Equipment	143	0	141	2
10 Advertising Sales	0	0	0	0
11 Other	10	0	5	5
12 Combination of Above	30	0	13	17
Total Number of Payments/ Considerations Made by Television Stations	326			

TABLE 15

BROADCAST STATION PAYMENTS/CONSIDERATIONS
(As reported by 107 cable systems)

Amount or Type of Payment	Payments To Systems	Per Year	Single Payment	Other
1 $1 - $5000	20	12	5	3
2 $5001 - $15,000	13	9	2	2
3 $15,001 - $25,000	0	0	0	0
4 $25,001 - $35,000	0	0	0	0
5 $35,001 - $45,000	0	0	0	0
6 Above $45,000	0	0	0	0
7 Advertising Time	13	4	0	9
8 Production Assistance	0	0	0	0
9 Equipment	45	0	35	10
10 Advertising Sales	0	0	0	0
11 Other	19	1	9	9
12 Combination of Above	15	0	12	3
Total Number of Payments/Considerations Received by Cable Systems	125			

Attachment No. 2

CABLE

TIME-WARNER IS WIRED FOR CABLE WARS

The combine could make a big push into basic programming

Time Inc. and Warner Communications Inc. already qualify as major powers in cable television. Their clout will grow if they merge into Time Warner Inc. But even that won't satisfy the two companies. They're bent on moving into the one area of the industry where they don't play a major role: basic cable programming. Time and Warner want to run some advertiser-supported channels that cable subscribers can watch for free—a service similar to MTV, ESPN, and USA Network.

Both companies have big plans for basic cable. Time's Home Box Office Inc. will launch an all-comedy channel this year. HBO is trying to take control of the operations at Movietime, a service that airs lots of Hollywood news, interviews with film stars, and trailers of coming attractions. Meanwhile, Warner is working on a deal with Robert Pittman, the founder of MTV Networks Inc., that will probably take advantage of his cable expertise.

ROOM TO GROW. The move into basic cable would be an important expansion for Time and Warner. They are already among the top cable operators—the companies that hook up the hardware. Time has 3.9 million subscribers, making it the second-biggest franchise owner after Tele-Communications Inc. Warner ranks fifth, with 1.5 million subscribers. In addition, Time's HBO and Cinemax dominate one part of the programming business: pay cable, where viewers pay extra to see recent movies and specials.

Basic cable is the missing piece, and it looks attractive because the companies need new markets with more promising opportunities to grow. Warner can't count on the Big Three networks to pay much more for the TV programs that its studio produces. The networks are trying to cut costs, and may soon win the right to produce more of their own prime-time shows. And HBO is struggling to expand its business. The number of cable families that paid extra fees for movie channels rose only 2% in 1988.

In comparison, basic cable looks like a happy hunting ground. Advertisers will spend about $1.3 billion on basic channels this year, a 21% increase over 1988, says senior analyst Larry Gerbrandt of Paul Kagan Associates Inc. Ad sales could leap to $2.8 billion by 1995. Basic cable channels also profit from the rising fees that operators pay to carry the most popular services.

FUCHS SEES
IN COMEDY

PHOTOGRAPH BY ROB KINMONTH

Time and Warner could easily dominate this side of the programming business. The two companies already own big stakes in some important basic cable programmers (table). Time also has an agreement that could allow it to run Cable News Network Inc. should Ted Turner leave his company. Time executives talk openly and frequently about the post-Turner era, although he seems eager to stay.

Time and Warner would like to control more than one basic cable channel. HBO's chief executive, Michael J. Fuchs, is already contemplating the advertising deals he could make with several services. He envisions incentive plans for cable that would be similar to the one Time employs for its magazines: Advertisers win discounts when they boost their spending on Time's publications and cut purchases at the competition.

The power Time-Warner would have alarms some potential competitors. Indeed, two major programmers that want to launch all-comedy channels, MTV and Columbia Pictures Entertainment Inc., haven't yet decided whether to take on HBO. There's only room for one comedy channel, and cable subscribers could prove to be a tough audience.

UPPER EDGE. Time and Warner enter the battle with the cable equivalent of a nuclear arsenal. For starters, nearly every cable system in the country carries HBO. Franchise owners might find Time's new comedy channel virtually irresistible if the company gives them a break on HBO. If that's not enough to beat the competition, Time's and Warner's own cable franchises—especially their key ones in New York City—could strike a fatal blow. It's extremely difficult for a new channel to woo decision-makers in the world capital of advertising and finance when they can't watch it at home.

HBO's Fuchs says he's confident that he'll be the winner in any showdown over a comedy channel. "Whoever's out there is going to run into a big machine," he says. MTV's CEO, Tom Freston, acknowledges that HBO's clout gives him pause, but wouldn't be a deciding factor. HBO is the nemesis of his parent company, Viacom International Inc., which operates the No. 2 pay-cable channel, Showtime. Columbia Pictures declined to comment on its plans, but industry executives say it has discussed its proposal with several leading cable operators.

While HBO prepares to leave audiences laughing, Fuchs says he wants to control Movietime. He has prepared a tape that he says shows how HBO could improve the channel's programming. It will play to an interested audience: Time and Warner own about 40% of Movietime.

The power of Time and Warner may be challenged on Apr. 12, when Senator Howard Metzenbaum (D-Ohio) chairs hearings on the proposed merger. But for now cable programmers are prepared for rough going as Time and Warner get down to basic.

By David Lieberman in New York

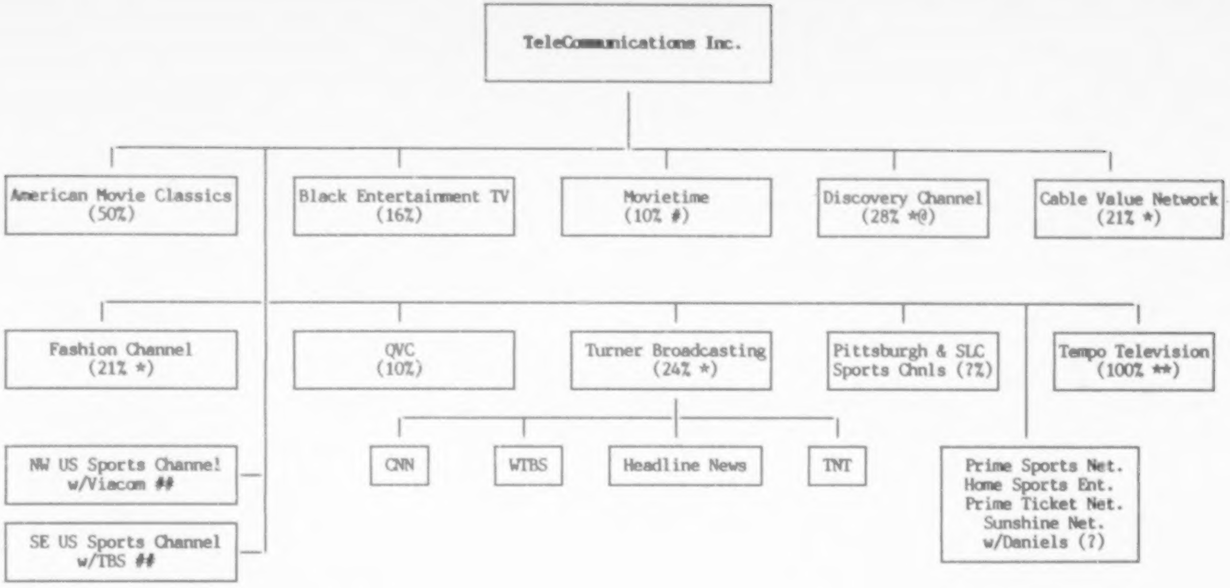
TIME AND WARNER: BACK TO BASIC CABLE

Service	Percent owned (Time and Warner)	Subscribers (millions)
TURNER BROADCASTING SYSTEM	13%	
CABLE NEWS NETWORK		47.9
SUPERSTATION WTBS		45.6
HEADLINE NEWS		32.6
TURNER NETWORK TELEVISION		23.0
BLACK ENTERTAINMENT TELEVISION	16	20.7
MOVIETIME	40	11.5

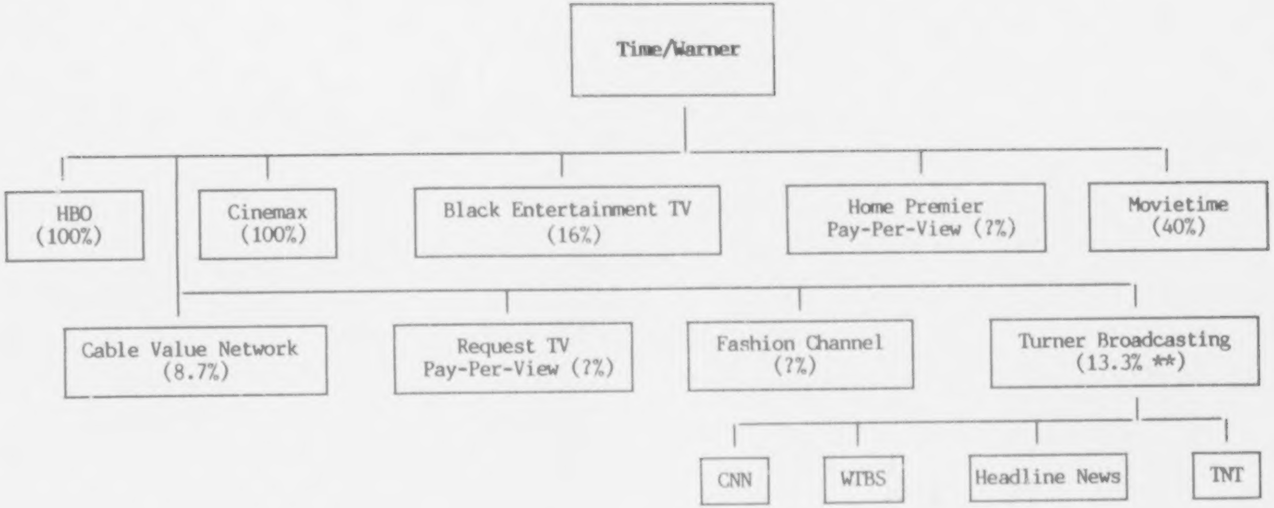
DATA: BW

Attachment No. 3

Vertical Integration Charts


TeleCommunications Inc.
American Movie Classics (50%)
Black Entertainment TV (16%)
Movietime (10% #)
Discovery Channel (28% *@)
Cable Value Network (21% *)
Fashion Channel (21% *)
QVC (10%)
Turner Broadcasting (24% *)
Pittsburgh & SLC Sports Chnls (7%)
Tempo Television (100% **)
NW US Sports Channel w/Viacom ##
SE US Sports Channel w/TBS ##
CNN
WTBS
Headline News
TNT
Prime Sports Net.
Home Sports Ent.
Prime Ticket Net.
Sunshine Net.
w/Daniels (?)

* Holdings include those of UA, United and other MSO's controlled by TCI.
@ TCI, Cox and Newhouse Cable recently offered to purchase the 40% of Discovery stock not already held by cable MSO's. Offer expires at the end of March 1989.
# Movietime ownership by United Cable which is controlled by TCI.
** TCI is leasing Temp TV to NBC.
## Proposed.


Time/Warner
HBO (100%)
Cinemax (100%)
Black Entertainment TV (16%)
Home Premier Pay-Per-View (?%)
Movietime (40%)
Cable Value Network (8.7%)
Request TV Pay-Per-View (?%)
Fashion Channel (?%)
Turner Broadcasting (13.3% **)
CNN
WTBS
Headline News
TNT

** Time Inc. has right of first refusal to buy controlling interest in CNN when Ted Turner sells his majority interest in the company.

Attachment No. 4

WEEKLY Television Digest

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WHITE PAPER

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Full Text

Cable Report to the President

By the Cabinet Committee on Cable Communications

Issued Jan 16, 1974. Members of Committee: Clay T. Whitehead, Director of the Office of Telecommunications Policy, chairman; Leonard Garment, Herbert G. Klein, Presidential Advisers; Peter G. Peterson, Secretary of Commerce; Elliot L. Richardson, Secretary of Health, Education & Welfare; George Romney, Secretary of Housing & Urban Development

OFFICE OF TELECOMMUNICATIONS POLICY

EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON, D.C. 20504

DIRECTOR

January 14, 1974

The President
The White House
Washington, D.C.

Dear Mr. President:

I am pleased to submit to you the report of the Cabinet Committee on Cable Communications. As you requested, the Committee has developed proposals for a new policy that will allow cable to be integrated into our nation's communications media in an orderly way that is consistent with the principle of the free flow of information so deeply imbedded in our national traditions.

During the Committee's deliberations, we heard the views of a wide range of industry groups and nonprofit and public interest organizations, and we also examined the extensive research on cable communications. On the basis of the views we heard, the research we examined, and our own study and deliberations, the Committee has recommended a comprehensive, new national policy for cable communications.

Our goal was to insure that cable would develop as a communications medium open and available to all Americans free of private or governmental barriers to its use. Under such a policy, we believe that cable can be a communications medium that allows the great creativity of the American people to express itself.

Sincerely,

Clay T. Whitehead

Distributed without charge to subscribers of Television Digest. Extra copies, $2.50 each, 10 or more, $1.50 each

INTRODUCTION

> ***"The Committee did not attempt to assign a role for cable or choose a place for it in the future of communications in this country, nor have we treated it as a modern day Rosetta stone capable of unravelling the complex problems facing this society. We have simply concluded that cable has much to offer, and it should be given an opportunity to prove its worth to the American people in the marketplace of goods and services and in the marketplace of ideas."***

On June 27, 1971, the President announced the formation of a Special Committee[1] to develop proposals for a comprehensive national policy on cable communications. In creating the Committee, the President noted that communications have a profound impact on the social fabric of our nation and that it was time to come to grips with cable communications in order to avoid the social, economic, and regulatory instability that this technological innovation could cause.

Early in the course of its work, the Committee established an interagency working group, which held many formal meetings and was in regular contact on an informal basis. In addition to the departments and agencies represented on the Committee, the working group coordinated its activities with other interested governmental organizations, including the Department of Justice and the Federal Communications Commission (FCC).

The Committee also heard the views of industry groups as well as a wide variety of nonprofit and public interest organizations. We also examined the many studies, reports, and research analyses regarding cable that have been prepared by a wide range of organizations.

After reviewing the current range of views and research, as well as conducting its own studies, the Committee has set out its conclusions and recommendations on the major policy issues regarding cable. These recommendations do not represent a master plan to create a fully operable, nationwide cable system, but rather a broad policy approach for integrating a new technology into our country's mass communications media.

In recommending the policies and types of regulation to govern cable during the foreseeable future, we attempted to forecast only about ten years into the future; we were concerned both literally and figuratively with "1984." Prediction is a perilous task in the rapidly changing communications field; and the chilling vision of "1984" can never be far from any group studying a new mass communications medium for an advanced technological society. We would rightly be held derelict in our duties if we took no steps to avoid the clear present and future dangers of government control of communications technology, which have been foreshadowed in the literary imagination.

The Committee has examined the growth of cable communications and the governmental response to it, and we have concluded that a new policy is needed (Chapter I). At the heart of the Committee's recommendations is a proposed policy that would separate control of the cable medium from control of the messages on it. The goal of this policy is to assure the development of cable as a communications medium open to all, free of both excessive concentrations of private power and undue government control (Chapter II). Our specific recommendations (Chapter III) flow from this basic policy proposal; their thrust is that neither the local monopoly power of each cable system nor the government regulatory power necessary to prevent abuse of that private power should be extended to the programs or other content of cable's channels.

The Committee has concluded that programming, advertising, and other information and services on cable channels can be allowed to develop on a free and competitive basis, with no more regulatory power exercised over the content of this communications medium than is exercised over the print or film media. Of course some safeguards are needed for cable, as for other media, to protect individual privacy and prevent the unwanted intrusion into the home of offensive material.

The Committee recognized that many of our policy recommendations should not be implemented immediately (Chapter IV). These policies are best applied to an industry that is more developed and mature than today's cable television industry. There is, however, a need for broad agreement now on a long-range, national policy for cable. Without such a consensus, it would be difficult to take the steps necessary to move from current cable policies to the future policies that we recommend. Consequently, the Committee has recommended a transition period in which a new cable policy would evolve, and we have specified transition policies and procedures to assure that there would be a reasonably advanced and mature cable industry in existence when the long-term policies take effect.

Finally, we have proposed a Federally-supported program to demonstrate innovative public service uses of cable technology and to identify more precisely the technical and legal safeguards necessary to protect personal privacy in the use of cable (Chapter V). Some of the Committee members, however, were not in favor of this proposal. They expressed misgivings regarding both the need for such a demonstration program and the desirability of the Federal Government supporting an endeavor that they felt should best be left to private industry and local governments. While their concerns were shared in varying degrees by the entire Committee, a majority of the members concluded that, on balance, such a program would be appropriate, as long as it stressed the preeminent roles of private industry and local governments and minimized ongoing Federal involvement.

The report concludes with a summary of the Committee's major, long-range policy recommendations and outlines the principal rights, obligations, and prohibitions created by such policies, as they affect cable operators, cable channel users, existing communications industries, and various levels of government.

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[1] The Committee was composed of Peter G. Peterson, Secretary of Commerce, who succeeded Maurice H. Stans; Elliot L. Richardson, Secretary of Health, Education and Welfare; George Romney, Secretary of Housing and Urban Development; plus Presidential advisers Herbert G. Klein, Leonard Garment, and Robert H. Finch. Clay T. Whitehead, Director of the Office of Telecommunications Policy, served as Chairman of the Committee, and his Office conducted the Committee's staffwork.

CHAPTER I

THE DEVELOPMENT OF CABLE COMMUNICATIONS AND THE NEED FOR A NEW POLICY

"Cable offers countless Americans a chance to speak for themselves and among themselves in their own way, and a chance to share with one another their experiences, their opinions, their frustrations, and their hopes."

There have been many names associated with the subject matter of this report — Cable TV, CATV, broadband distribution networks, coaxial communications, and others. The names reflect the multi-channel distribution capacity of coaxial cable technology and the services such technology makes possible. Recognizing that any name chosen will be awkward or incomplete until it finds its way into general usage, we have chosen for our report the most simple and most encompassing, if not the most descriptive, name: "cable."

Coaxial cable, however, is only one type of broadband communications technology. Others, such as multi-channel microwave, may become available soon, while still others, such as fiber optics and laser communications, are further down the road. However, the substance of this report is applicable to the electronic distribution functions of such technologies, rather than to coaxial cable alone. We believe that our policies are sufficiently broad and flexible to accommodate developments in the emerging communications technologies. The policies are, by design, not overly sensitive to the technology employed, since the potential for abusive monopoly control of multi-channel distribution systems are inherent in the technologies that we foresee being used for mass communications purposes.

In attempting to create a policy for cable and other multi-channel distribution systems, the Committee found that several technical and economic facts provided an indication of the potential opportunities and risks presented by their future development.

Cable has the technical potential to become a communications medium of abundant capacity, with an almost limitless number of channels capable of carrying virtually any kind of communications.[1] Cable can distribute information to all households, schools, and places of business in an area, or it can route it to specific locations upon electronic request. It can offer a two-way capability allowing users to signal their wishes back up the cable and thus select particular programming or other information, or order goods and services from among those offered.

Economically, two factors are relevant. First, the cost of providing a cable channel is relatively low and is likely to decrease as improving technology expands the number of usable channels and lowers the cost of electronic equipment the customer may use in conjunction with cable. Thus, the cost of communications capacity is likely to be a small component of the overall cost of producing and distributing television programming, or of many other information services that might be offered over cable. Second, the apparent economies of scale involved as the number of channels and customers increases on a cable system mean that, in any particular neighborhood or community, only one cable system is likely to be viable and efficient; thus, cable will be a natural monopoly in each locality.

The remainder of this Chapter is devoted to a review of cable development and regulation to the present and an examination of the need for a new public policy regarding cable communications.

The Growth of Cable

The first cable systems were simply community antenna systems (CATV) built in the late 1940's to bring better television reception to isolated communities in mountainous parts of Pennsylvania and Oregon. In these early CATV systems, for a monthly fee, customers' homes would be linked by coaxial cable to a tall antenna which could receive signals from television broadcast stations.

The first cable operators were usually local businessmen, who encountered little regulation. The FCC chose to exercise no authority over cable, and most state governments took little notice of it. Local governments became the regulators during cable's first decade largely because CATV operators needed permission to use public property and rights of way to lay their cables. The nascent television broadcast industry also paid little attention to cable systems aside from vaguely endorsing them as a means of extending and increasing the size of their viewing audience.

Despite the limited number of channels CATV systems could transmit, this service spread rapidly throughout many small towns in this country. In 1952, there were some 70 cable systems with 14,000 customers, while 10 years later there were an estimated 800 systems and 850,000 customers.

The decade of the 1960's was a period of even greater growth for cable. New technology increased the potential channel capacity of cable systems to 20 or more channels by the end of the decade. A number of cable systems were not only providing improved reception of nearby broadcast stations, but were also "importing" additional broadcast signals via microwave links from television stations in distant cities. Dozens of systems also began to offer some form of locally originated programming, often by transmitting pictures of news service or stock market ticker tape machines, time and weather information, and local advertisements.

Now, cable is no longer simply CATV. It is no longer simply a conduit for television distribution to the home. And it is no longer a "cottage industry." From its origins as a predominately rural and small town industry, cable is now beginning to come to some larger cities. It has grown to an industry composed of over 3000 systems in 1973, connecting almost 8 million households and continuing to grow at a rate of more than ten per cent per year.

The attitudes of the investment community toward cable have fluctuated widely in recent years. Currently, cable is facing a slow-down in the rate of investment flowing to construction of new systems in major cities, in part due to tight money markets and in part to investor disenchantment in reaction to over-optimistic views of cable profitability and growth.

The actual prospects for cable growth, however, have not fluctuated appreciably. In fact, research and development are producing lower-cost distribution methods and equipment for specialized home use of cable programming and other information services. It is reasonable to expect that cable's recent growth trends will continue or even accelerate.

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[1] In this report, a "channel" means the communications capacity for the equivalent of one standard television signal (6 MHz). This communications capacity may be used, whole or sub-divided, for distributing audio, data, single-frame, facsimile, and other types of information, as well as a television signal. Thus, several "channels" of various kinds of communications might be distributed over one equivalent television channel.

Thus, cable is on the verge of becoming a new medium of communications in its own right, a vehicle for a wide variety of new services, and big business.

Cable Regulation and the Need for a New Policy

The changes in cable technology and in the economic and social importance of cable should have been accompanied by changes in the public policy that govern its regulation. Yet, the regulators' perception of the cable medium has lagged far behind its evolving reality.

Federal regulation of cable is presently based upon the Communications Act of 1934, which deals with technologies that can accommodate only a limited number of signals. Lacking Congressional guidance and uncertain of its authority, the FCC at first denied that it had jurisdiction over cable. Through the late 1950's and early 1960's the Commission maintained this position, but in 1959 and 1966, it sought legislation expressly conferring such jurisdiction. During this same period, the Commission gradually moved to regulate cable indirectly by exercising its unquestioned authority over the other communications services that cable was using. The FCC began by placing restrictions on cable systems that were served by the microwave facilities of telephone companies and other communication common carriers. By 1966, the FCC had asserted broad regulatory authority over all cable systems, principally with respect to retransmission of television broadcast signals, and, in effect, froze cable growth in the nation's top 100 television markets. In 1968 the Supreme Court upheld the FCC's action as "reasonably ancillary" to the Commission's power to regulate television broadcasting.[2]

The FCC extended its jurisdiction over cable in March, 1972, when it issued rules that dealt not only with the retransmission of television broadcast signals, but also governed access to, and use of, nonbroadcast cable channels. At the same time, the FCC established technical standards and divided regulatory jurisdiction between the Federal and local levels of government. Cable regulation under the FCC's current rules is discussed in the Appendix to this report.

The legal basis for the FCC's broadening of its authority over cable beyond retransmission of broadcast signals was narrowly upheld by the Supreme Court in June, 1972, in a case challenging the FCC's authority to require cable operators to originate programs. The deciding vote in the 5-4 decision was cast by Chief Justice Burger who stated in his concurring opinion that:

> "Candor requires acknowledgment ... that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts."

The Chief Justice added:

> "The almost explosive development of CATV suggests the need of a comprehensive reexamination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts."[3]

Presumably the FCC could continue this process of step-by-step rulemaking for cable under court interpretations of its existing authority but, as Chief Justice Burger noted, the jurisdiction of the FCC to regulate cable derives from a very limited foundation in the Communications Act of 1934, which created the national policy for broadcasting's use of the public airwaves. That policy was designed for a scarcity of outlets, but cable needs a policy designed for a communications medium of abundance and diversity.

If we do not create a new public policy for cable, it seems clear that cable will continue to develop and be regulated in the policy mold created for broadcasting. To some extent, this choice already is being made by the FCC, almost by default, since neither the Congress nor the Executive Branch has devised an alternative policy. In the absence of an alternative policy view, cable is regarded simply as an extension of, and a supplement to, the broadcast television industry. It is treated as a secondary service, albeit one that could engulf the primary broadcast service if cable's many channels are used to their full capacity. The perception of cable's multi-channel capacity as a threat to broadcasting could retard cable growth and even limit full use of all its capacity in order to protect broadcasting's financial viability.

But cable is not merely an extension or improvement of broadcast television. It has the potential to become an important and entirely new communications medium, open and available to all. The Committee has concluded, however, that cable may never become what it can become if it continues to be constrained by the policy of the Communications Act.

The Need for Federal Action

The new public policy that is needed for cable communications must be created through a conscious and deliberate effort which will anticipate both the risks and opportunities of cable development.

We are approaching what has been characterized as a "post-industrial" society in which knowledge and information will be major factors in economic enterprise as well as in personal growth and satisfaction. In the past, the expansion and application of any new technology was often encouraged without particular concern for its future impact. Many Americans have accepted technological change almost as a good in itself. While our enthusiasm for technological change has been almost without bounds, in earlier times there was more room to compensate for error. If somehow technology went awry in one place or at one time, correctives could be applied in a different place or time.

But the era of haphazard technological development is drawing to a close. We can no longer permit technological innovation to "just happen," and then attempt to "regulate away" the adverse effects. This is especially true of a communications technology such as cable, which involves the delivery and exchange of knowledge and information. Because we have a legal and social system that fosters, and is dependent upon, a free flow of information so that a well informed citizenry can guide its own destiny, the question of the relationship between the private communications media and the government is, in many ways, the ultimate issue in a free society. If the achievement of a new relationship between government and the private cable medium is not anticipated but left to chance, the free flow of diverse information and ideas that is protected by the Constitution could be endangered. This is the most important reason for a clear and far-sighted policy for cable technology on the Federal level: the overriding national interest in freedom of expression.

There is also another reason, less philosophical, but very important. Cable is not only a medium of expression, it is an industry — an employer of labor and capital, a producer of goods and services, and a contributor to the overall productivity of our economy. Cable is an industry which is closely linked to several major national industries including electronic data processing, telephone, television and radio broadcasting, the motion picture and music industries, and communications satellites. Although each cable system is a local enterprise, it distributes television signals in interstate commerce. Because of these characteristics, cable requires a consistent and coherent national policy.

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[2] United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

[3] United States v. Midwest Video Corp., 406 U.S. 649, 675-76 (1972).

Recognition of the need for a national policy, however, must not preclude an appreciation of the important and often diverse local interests in the development and performance of cable systems. Localism plays as important a role in our system of mass communications as it does in our system of government. Cable can fulfill its promise of providing a medium for a multitude of diverse voices serving both local and national purposes only as long as state and local governments are given a substantial role in determining the policies for cable communications services.

The Nature of the Choice to be Made

Having concluded that a new policy is needed for cable communications, we felt it important to clarify the issues that underlie the policy choice to be made.

Many questions have been raised concerning the ultimate implications of cable for society. Will people use all the services that full development of cable promises? Will they be able to absorb all the information cable can place at their fingertips or will it result in "information overload" and lead to increased confusion instead of increased knowledge? Will multiplying the choices available to us enhance the differences among us and result in social and political fragmentation? Will there be a "fractionalization" of audiences because of cable; and if so what will be its effects on social stability and on the economic viability of the broadcasting and cable industries? Will there be a loss of the sense of community and nationhood that has been enhanced by television broadcasting? Will there be an alienation of group from group, region from region; an unravelling of the social fabric and the development of a parochial outlook to replace a national and international outlook? Will a President be able to command all the major television channels to make an address to the nation? If not, how will this affect the political and governmental processes?

Every new medium of communications has posed similar questions, and we have no way of providing definitive answers to such questions in advance. We are certain, however, that the response to the challenges posed by new communications technologies must not be to stifle their growth because of fears about their effect. A democratic society must have faith in the good sense and resilience of its citizens and institutions in dealing with advancing technology. The extent to which we as individuals and as a society are able to benefit from the development of cable communications depends upon the wisdom and ingenuity displayed by private citizens, private industry, and governmental agencies.

We believe that cable development has the potential of creating an electronic medium of communications more diverse, more pluralistic, and more open, more like the print and film media, than our present broadcast system. It could provide minority groups, ethnic groups, the aged, the young, or people living in the same neighborhood an opportunity to express, and to see expressed, their own views. Yet it would also enable all of these groups to be exposed to the views of others, free of the homogeneity which characterizes contemporary television programming.

Cable offers countless Americans a chance to speak for themselves and among themselves in their own way, and a chance to share with one another their experiences, their opinions, their frustrations, and their hopes. Rather than increase the alienation of individual from individual and group from group, cable could combine the shared experience of national television with a type of active participation in the political and social process that was common in the days before urbanization eroded the opportunity for personal involvement in events that affected the community.

It is hazardous to attempt to predict cable's place in the future of communications. Even more than many other new technologies, cable has a host of zealous proponents who wax enthusiastic about a future in which cable will serve as an electronic genie ready to provide a rich variety of services to mankind. Others are doom-sayers who see cable as the instrument that will lead us inevitably into "1984," serving as the final extension of the industrial revolution which will make us the slaves of technology, leading lives devoid of freedom or privacy.

Still others see cable as having almost no impact. They predict it will struggle along as a minor supplement to broadcast television and will be shorn of all its glamour as soon as another new technology captures the imagination of a fickle constituency of academics, technocrats, newspaper feature writers, and assorted futurists.

The Committee did not attempt to assign a role for cable or choose a place for it in the future of communications in this country, nor have we treated it as a modern day Rosetta stone capable of unravelling the complex problems facing this society. We have simply concluded that cable has much to offer, and it should be given an opportunity to prove its worth to the American people in the marketplace of goods and services and in the marketplace of ideas. The proper role of government policy is to adopt, consciously and deliberately, a policy which insures that access to and use of cable's channel capacity are not constrained by any one force, whether it be the cable system operator's power over his channels or government regulation to deal with that power.

CHAPTER II

CABLE: A MEDIUM OF COMMUNICATIONS AVAILABLE TO ALL

> ***"At the heart of the Committee's recommendations is a proposed policy that would separate control of the cable medium from control messages on it. The goal of this policy is to assure the development of cable as a communications medium open to all, free of both excessive concentrations of private power and undue government control."***

If cable is to become a constructive force in our national life, it must be open to all Americans. There must be relatively easy access at one end of the cable for those who wish to promote their ideas, state their views, or sell their goods and services; and at the other end, the consumer must have a meaningful freedom of choice to select from among a diverse range of cable programming and services. This unfettered flow of information is central to freedom of speech and freedom of the press which have been correctly described as the freedoms upon which all of our other rights depend. These freedoms are no less essential in the days of cable than in the days of soapboxes and pamphlets.

Our nation's theory of democratic government is based on the principle that the power to make decisions affecting the flow of information to and from the individual must be dispersed so that irresponsible, inequitable, or simply bad decisions will not have a pervasive, irreversible effect. In view of this principle, both governmental power and excessive concentrations of private economic power over the flow of information have been viewed as inimical to the achievement of a free and open society. The long-standing and deeply-felt opposition to concentrated private power over the media stems not simply from a belief that such power inevitably must be antithetical to this central principle of our Government. Although this reason continues to be valid, traditionally the excessive concentration of private power also has been opposed because it has often been used as the pretext for Government's own intrusive entry into the communications media. Given the technological and economic imperatives of cable, excessive concentrations of both private power and government power threaten the unfettered flow of diverse information and ideas in the cable medium.

The private power of the cable system operator is potentially great, because of the local monopoly characteristics of cable. Unless restrained in some manner, the system operator could control all of the channels on his cable system, which could constitute the bulk of the channels of electronic communications in a particular locale. There are two ways to restrain this power. One is a detailed governmental prescription of the affirmative obligations of the cable operator, requiring him to use his power in socially desirable ways. The second alternative is to limit the number of channels over which the cable operator has control of program content and to require that the bulk of channels be leased to others. By the first alternative, the Government would seek to regulate the *use* of private power; by the second, it would seek to limit its *extent*.

The first alternative was chosen for broadcasting — a policy prescribing the use of private power. Under this approach, the FCC enforces affirmative programming obligations upon the broadcaster to regulate exercise of his power over program content. While it is difficult to take issue with many of the goals underlying such government-imposed program requirements, they result in a regulatory framework in which the Government has the power to oversee the content of a medium of communications and expression. The existence of the power affects the relationship between the Government and the broadcast media, and creates the constant danger of unwarranted governmental influence or control over what people see and hear on television broadcast programming.

The Separations Policy

The Committee has chosen the second alternative — a policy limiting the extent of private power, rather than asserting detailed regulatory control over the use of that power. We recommend adoption of a policy that would separate the ownership and control of cable distribution facilities, or the means of communications, from the ownership and control of the programming or other information services carried on the cable channels. By separating the distribution function in cable, which is a natural monopoly, from the programming functions, which can be highly competitive, the dangers of governmental intrusion and influence in programming can be avoided while the wide variety of competitors vying for the public's attention can be expected to produce a diversity of programming.

This policy would create an essentially neutral distribution medium and require control of the medium to be separated from control of the messages on it. The effects of private economic power on the means of distribution would cease to be a danger to the free flow of information, and there would be little need for the continued application, or threatened application, of Government power. The cable system operator would be obliged to deliver the messages of channel users with as little regard to content as the Postal Service has for the content of the print media. Ideas would have to win their influence in the marketplace, rather than requiring exposure through the regulatory process.

To place the separations policy in perspective, it is important to understand the functions of the mass media, and the present extent of Government regulation of the various mass media.

The Functions of the Mass Media

Three basic kinds of functions are involved in the mass media: (1) the creation or compiling of information or entertainment; (2) the selection or editing of this information; and (3) the transmission or distribution of the information to the public.[1]

The owners of the various mass media differ markedly in the nature and extent of their involvement in each of these three functions. The information and entertainment that appears in newspapers, for example, is written primarily by reporters and writers who are employees of the newspaper, and this material is selected and edited by other employees. The newspaper is often printed on the paper's own presses and usually distributed throughout the metropolitan area in the newspaper's own trucks. It ultimately reaches the reading public through independent newsstands and retail stores or through delivery services, which may be owned by the newspaper. In magazine and book publishing, there is less of this ''vertical integration''[7] of the media functions than in newspaper publishing. A book publishing company is often no more than a suite of offices from which representatives of the publishing company purchase manuscripts from writers, and then contract with printing companies to print them. The books are shipped through the mails and various express companies to a wide range of independent retailers, who sell the books to the reading public. While many magazines employ their own writers, they often contract out most of the functions involved in producing and distributing magazines. In television broadcasting, the essential functions of selection and transmission are, by law, performed by the same entity, the television station; and the station employees may create the programming as well.

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[1] The terms "media" and "mass media" are often used with great ambiguity. Generally, "medium" refers to the various technological means of producing or distributing information such as newspapers, magazines, radio broadcasting, or motion pictures. The term "media" usually refers to the industries or business that provide information or entertainment to the public. A medium can have mass availability, technologically and economically, but it may or may not collect a mass audience around a particular presentation. For example, television today is a mass medium in both senses, but hobby magazines collectively constitute a mass medium only in the sense of availability to a large audience: millions of copies of such magazines could be inexpensively printed and distributed, but far fewer would be bought and read.

Government Regulation Common to All the Media

Despite the differences among the various mass media, Government control or regulation of media power is, in many respects, reasonably uniform.

To the extent that private power over a medium of mass communications takes the form of economic control, Government regulation is very little different from its regulation of any other business. For example, the antitrust laws apply to the media to prevent excessive concentration of economic or market power, just as they apply to the production and distribution of other goods and services. Indeed, to the extent that such laws and regulations prevent the assertion of significant private power over the dissemination of ideas, information, and entertainment, Government-imposed limits on the growth and exercise of private economic power also foster competition in the marketplace of ideas.

The communications media, however, because they are the media of expression, have another type of power that arises simply through the force or attractiveness of the ideas, information, or entertainment provided. It is here that Government power is and must be strictly constrained, lest it stifle the opportunities for the easy access and diversity of choice that the Government in a free society is supposed to foster. Government attempts to limit or suppress the flow of information have been regarded as particularly pernicious and are explicitly prohibited under the First Amendment's injunction that: ''Congress shall make no law ... abridging the freedom of speech, or of the press ....''

But even within the framework provided by the deeply rooted legal and philosophical principles embodied within the First Amendment, the exercise of Government regulation of the media goes beyond the regulation of the media's economic power. Government, especially state and local governments in the exercise of their police powers, protects the individual's right to be free of unwarranted and unwanted intrusions. Therefore, the application of certain laws regarding obscenity, pornography, privacy, libel, slander, criminal incitement, and the like are deemed by the Supreme Court to be consistent with the First Amendment. Similarly, Government properly may regulate to some extent which means of communication may be used to disseminate which types of information. Because of the need to strike a reasonable balance among competing constitutional rights and considerations, each means of communication presents its own problems in defining the nature and the permissible scope of this type of Government regulation. For example, certain materials cannot be sent through the mail though they can be sold on newsstands; and a film that could be shown in a theater could result in criminal penalties if broadcast on television.

Government Regulation Unique to the Broadcast Media

The broadcast industry, in common with all the other mass media, is subject to Government limits on its economic power, and the exercise of Government ''police power''-type regulation of its information content and its transmission function. It is only in one significant respect that Government regulation of broadcasting is vastly different from the *laissez faire* approach that the First Amendment requires for the other media of expression.

In broadcasting, Government power is used to shape and direct the content of programming toward various social ends by requiring, or indirectly coercing, the presentation of various types of information and programming in the name of the public interest. Such aspects of broadcast regulation as the encouragement of certain types of programs by means of the license renewal process, the concept of broadcaster responsibility for all information disseminated over the airwaves, the equal time requirement for political candidates, and the Fairness Doctrine requiring ''balance'' in the discussion of public issues, have no counterparts in the nonbroadcast media. No Government agency directs a documentary film producer to present all sides of a controversial issue, or a magazine publisher to devote ''equal space'' to all candidates for an elective office, or a newspaper to devote some of its space to children's features or stories about minority group problems.

It is only in the broadcast media that the First Amendment has been interpreted to permit governmental efforts to foster the expression of certain ideas or information by intruding upon the creation, selection, and editing functions of the private media owners. Why this difference? The answer turns upon the unique power of the broadcaster in the marketplace of ideas.

The dominant characteristic of the broadcast media, especially television, has been the scarcity of usable frequencies or channels. This scarcity has facilitated an economic concentration in the broadcast industry that, because of the governmental role in assigning frequencies for use by the industry, is in effect a Government-conferred monopoly of broadcast outlets. In conferring this benefit upon broadcasters, the Congress has also decreed that broadcasters, by law, may control and must exercise responsibility for both the transmission and the programming functions of their stations. This combination of ''vertical integration'' of the media functions and the scarcity of outlets gives television broadcasters great power over the flow of entertainment and ideas. To offset such power, there was an inevitable expansion of Government regulatory power over the broadcast media; and it is not surprising that this regulation of the medium has carried over into regulation of the broadcaster's programming.

As a practical matter, to regulate the means of communication, apart from the programming, when the two are controlled by the same entity, requires powers of discipline, distinction, and restraint by Government that are perhaps unattainable. The regulation of programming tends to become an end in itself, rather than a means of achieving constitutional goals for the free flow of information. Government is driven to consider the practical effects of its regulation in terms of the effects on program content. What information and which speakers should be given preferential access; and, in the final analysis, what should the American public see and hear? These questions inevitably arise, not only when the Government chooses to control information through prior censorship, but also when it seeks to require the presentation of certain types of information through affirmative programming requirements.

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[7] A firm is said to be vertically integrated if it performs a series of successive functions in the production and distribution of its products. As an example, a petroleum firm that produces crude oil, transports it, refines it, and again distributes it to its own service stations would exhibit a high level of vertical integration. An enterprise is horizontally integrated if it operates a number of facilities that produce the same products. Examples are chain stores, and, in the cable industry, the so-called multiple system owners who operate a number of geographically dispersed cable systems.

The end result of the fundamental policy choices made for broadcasting is that it is not a medium of communications open and available to all. The originators and producers of programming, advertisers, and individual citizens can gain access to the medium only through the broadcast industry or through a regulatory process that uses Government power to require the broadcasting of certain types of material. There is a very real danger that access to cable will be similarly constrained, unless an appropriate policy is chosen.

The Print Media as a Model for Cable

Cable's multi-channel technology, together with the economic imperatives of a medium that is a natural monopoly, could lead to an even greater concentration of power than exists in broadcast television. When a single cable operator has the power to control the programming and information content of all the channels on his system, his monopoly power over the cable medium of expression is nearly absolute. Therefore, detailed and prescriptive regulation by Government is well on its way. Federal rules already require the dedication of certain channels on cable systems for such purposes as local government use, other rules apply the Fairness Doctrine, the equal time requirements, and other aspects of "public interest" program regulation to programs originated by the cable operator. If broadcast history is any guide, this program regulation will expand until access to cable is circumscribed by Government regulations.

The only way to avoid the broadcast regulatory model and allow cable to develop as a medium of communications open and available in a manner similar to the print or film media is to preclude the vertical integration of the programming and distribution functions in cable. In this way, the cable operator's distribution monopoly would not produce any concentration of power over free expression in the use of cable channels and would offer no pretext for Government control of programming or other information distributed by cable.

Thus, the separations policy would limit both private control over cable channels, and the Government regulation intended to offset that control. Under the separations policy, cable may be able to offer Americans the opportunity, diversity, and richness that characterize the print and film media in this country. Cable would offer unfettered access for those who wish to use its channels to promote their ideas, state their views, or sell their goods and services; and the cable customer would have the freedom to pick and choose from among a diverse range of entertainment, information, and services.

CHAPTER III

LONG-RANGE POLICY RECOMMENDATIONS

> *"We must guard against allowing regulation of the communications media to become an end in itself rather than a means of achieving the free flow of information and the free expression of ideas that are so vital to a democratic society."*

This Chapter sets forth the Committee's policy recommendations for a developed cable industry. Discussion of the recommendations is in three parts:

- an industry structure for the 1980's and beyond;
- an institutional and jurisdictional framework for cable regulation; and
- the relationship between the consumer and the cable.

As stated in Chapter II, the Committee attempted to anticipate and deal with the adverse effects of concentrated power in a vertically-integrated cable industry. We recognize, however, that full implementation of the policy is not appropriate for the developing cable industry of today, and, therefore, in Chapter IV the Committee recommends a transition period during which the full policy gradually would be implemented.

Industry Structure: Distribution

Recommendation 1: Control of cable distribution facilities should be separated from control of programming and other services provided over the channels on those distribution facilities.

Under this recommendation, the principal business of the cable operators[1] would be to lease their channels, or sell time on those channels, to individuals or organizations that wish to offer programs or other services to the public.[2] The cable operator would be precluded from having any financial interest in, or relationship with, those leasing channels or time on his cable system. This would preclude common holdings in stock or other securities; loan arrangements; or any other interest in the channel user's enterprise.[3] If the cable system operator were to have such an interest in a channel user, he would have an economic incentive to favor the user in which he had a financial interest.

Simply requiring the system operator to treat all channel users on a non-discriminatory basis without prohibiting him from having an economic interest in a user would not be adequate to prevent anti-competitive behavior. The cable operator could, for example, charge artificially high, but still "non-discriminatory," rates to users of his channels and use the excess profits from his system ownership activities to subsidize his programming affiliate. This cross-subsidization would place the other channel users at a severe competitive disadvantage. Moreover, requiring "arms length" transactions between companies in the same corporate structure and prohibiting cross-subsidization present severe enforcement problems. Such problems typically lead federal or state enforcement agencies to impose rate-of-return, public utility-type regulation in an effort to control cross-subsidization and other anti-competitive abuses.

The Committee believes it is better to establish policies at the outset that deal with the causes of such adverse effects than to create the incentives for abuse and invite detailed Government regulation to deal with the effects.

Recommendation 2: Common ownership or control of cable systems, interconnection facilities, and program supply services should be the only form of cable "network" operation that should be prohibited.

It is likely that landline, terrestrial microwave, communications satellite systems, or other means will be used to interconnect cable systems on an *ad hoc* or long-term basis to create various national or regional networks for program distribution. Therefore, the Committee considered whether implementation of the separations principle must be extended beyond the local cable system itself to prevent the adverse effects of regional or national cable monopolies.

There are four functional entities that must be taken into account when applying the separations policy to such network operations: (1) the cable system operator; (2) the program retailer, who uses channels on local cable systems to offer programs to the subscribers; (3) the program supplier or producer, who provides programs to the retailer; and (4) the interconnection facility operator, who provides intersystem transmission capacity to connect one or more channels on several cable systems. Naturally, there may be overlaps among these entities. The cable system operator may be a multiple system operator who offers channels for lease on his many systems to a single program retailer. Moreover, there will be instances in which the program retailer and the program supplier are one and the same.

In one form of networking, the program retailer would lease channels, or buy time, on a number of local cable systems and on interconnection facilities, in order to reach a large number of geographically dispersed viewers. This type of networking would pose no threat to the public interest unless a single program retailer controlled a major portion of the available local cable system or interconnection capacity or entered into anti-competitive agreements with the operators of these facilities. Such instances of abuse can and should be dealt with under the antitrust laws, and there is no reason to prohibit networking of this type.

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[1] The cable operator is the person or entity holding the cable franchise or effectively controlling, through ownership or other arrangements, the operation of the cable system in the geographical area covered by the cable franchise. The cable "system" consists of the facilities used for "head-end" receive-transmit, switching, storage and control functions, facilities used for local distribution of signals, subscriber "taps," and related equipment and functions. We recommend, however, that the separations policy not apply to those limited capacity cable systems whose operators do no more than (1) retransmit the signals of television and radio broadcast stations that are defined by the FCC as "local" to the cable system's franchise area, and (2) provide "weather scan" or teleprinter-type information service on no more than one or two standard television channels.

[2] Even if the cable system owner does not control the content on all channels, he will still have an incentive to restrict access to his system by others if he controls and profits from a significant proportion of the channels, thereby defeating the purpose of the separations principle. It would, however, be consistent with this principle to allow the system operator to continue to have control over the channels used for retransmission of the local and distant television broadcast signals authorized under the FCC's cable television rules effective on March 31, 1972 (i.e., all local and "significantly viewed" stations, plus the number of distant signals allowed on the basis of market size of the cable system's community), as well as control over the channels used for retransmission of radio signals authorized by the FCC. Program content of such channels is, of course, under control of the broadcast stations that originate the signals retransmitted by the cable operator. It also would not be inconsistent with the separations principle to allow the system operator to have program control over one or two additional channels. Of course, the policy would not preclude the presentation of a program produced by a firm in the same corporate structure as the cable system owner, so long as the channel lessee is independent of both the cable system and the program producer.

[3] This requirement would not preclude the system operator from having variable rates for channel leasing, so long as there is no discrimination among comparable channel users or users (see Recommendation 9).

A second form of networking would involve the common ownership or control of local cable systems and interconnection facilities by a single multiple system operator. This, too, would pose no competitive threat to programming competition, as long as there is non-discriminatory access to cable channels and competitive availability of interconnection facilities.

The only form of networking that necessarily raises concerns sufficient to warrant its prohibition is the common ownership or control of cable systems, interconnection facilities, *and* program supply services. In these circumstances, program retailers, who are the pivotal point in the competitive supply of services to the viewers, would be caught in such a cable network's vise, making realistic competition impossible.

The common ownership of any other combination of functions, except cable ownership and program retailing, requires no special prohibition. Application of the antitrust laws should be sufficient to police possible abuses arising from other forms of joint ownership.

> *Recommendation 3:* There should be no restrictions on either cross-media ownership or multiple ownership of cable systems.

We recognize the potential dangers in allowing newspaper publishers or broadcasters to own cable facilities. Common ownership of media that are nominally competitive in the same markets may limit the range of ideas discussed and reduce the competition for advertising revenues and, in some cases, for audiences.

However, in the long-run, cable development could significantly alter the competitive relationships among the broadcast and print media and the cable industry. It would not constitute economic protectionism to give some consideration to those industries, especially television broadcasting, that would bear the brunt of technological innovation and competition from a successful cable industry. Broadcasters and publishers should have an opportunity to own or invest in cable systems in the communities they serve without being required to divest themselves of their present media holdings in those markets. Although broadcast stations would thus be allowed to a limited extent to engage in both program origination and cable operation in the same community, they would still be bound by all the restrictions on program control placed on cable operators.[4] There would, of course, be no prohibition against broadcasters or newspaper publishers owning cable systems outside the markets they already serve with these other media outlets.

It is reasonable to expect that most broadcasters and publishers would prefer to offer programming on cable channels that they lease rather than to own cable systems, and that should be allowed. On balance, the separations policy, with its assurance of access by all channel users, considerably lessens any potential harm which may arise from the cross-media ownership of cable systems. Therefore, no special restrictions on such cross-ownership appear to be necessary. Excessive concentrations of cross-media ownership would, however, be prohibited by normal operation of the antitrust laws, as would excessive concentration of control over broadcast-newspaper-cable channel content.

The Committee also considered the question of limits on the number of cable systems any one firm may control or the number of customers it may serve. The present trend towards increased concentration of ownership by "multiple system owners" would present serious problems if cable operators were allowed to control the use or content on all or most of their channels. Although the separations policy would significantly lessen those dangers, some anti-competitive dangers and the risk of technological stagnation presented by large-scale multiple system ownership would remain and should be dealt with by rigorous enforcement of the antitrust laws. However, such enforcement should be tempered by the usual "infant industry" considerations that have generally been found to be in the public interest with respect to developing new industries.

As a final matter affecting ownership of cable systems, the Committee considered the appropriateness of municipal ownership. We concluded that, while there was no need to prohibit such ownership by law, it would be unwise for municipalities to function as cable operators. For the foreseeable future, cable system ownership will be a capital-intensive enterprise that may well be subject to rapid technological change and associated financial risks. As long as private entrepreneurs are willing to do so, it is almost certainly an unsound allocation of tax dollars for municipalities to underwrite such ventures. Moreover, with a financial interest in the entity being regulated, it would be inappropriate for a local authority to function simultaneously as the "regulator" and operator of the cable system.

> *Recommendation 4:* Telephone common carriers should not control or operate cable systems in the same areas in which they provide common carrier services.

Cable systems share some of the characteristics of existing common carrier telephone systems. Both provide direct electronic connections between the subscriber and a central office; thus, both are capable of identifying and serving individual customer needs. Although most existing cable systems provide only one-way distribution of conventional television programming, the systems could also provide subscribers with a capability for signaling back up the cable to order particular programming or other information services.

Similarly, telephone networks intended to carry "two-way switched voice communications" have the potential to carry other one-way and two-way information services, although they cannot provide television or certain data services with present voice communications technology.

Unless limited in some way, widespread expansion by telephone companies into the cable business could stifle the development of competitive cable communications service. The local telephone companies' franchise arrangements and rights-of-way, their established marketing and operating organizations, and the opportunities they have for cross-subsidization from existing monopoly services could work to obstruct cable development, as could the heavy capital needs of telephone companies to extend and improve telephone service. Moreover, the size, vertical integration, and long-distance interconnection role of the nationwide Bell System, if extended to cable communications, could make it very difficult to maintain any realistic competition in communications.

The Committee has concluded, therefore, that the present FCC rule, which prohibits telephone companies from owning or controlling cable systems within their telephone service areas, should be retained. Telephone companies should, however, be allowed to continue to offer cable system operators transmission facilities for local distribution under the type of "lease back" arrangement that is currently in use.[5] Moreover, the carriers should provide cable operators with nondiscriminatory access to the carriers' poles, conduits, and other rights of way.

While telephone companies should be precluded from control of cable systems, they should be allowed to compete with cable systems in offering communications capacity for such services. After the cable industry is fully developed, there are likely to be a range of communications and information services that could use either cable or telephone systems. It will, therefore, be important for cable franchising authorities and utility commissions to make certain that the cable system, with its local monopoly of broadband distribution facilities, and the telephone company, with its monopoly over switched public telephone service, can compete fairly with each other and with others, without cross-subsidization or other anticompetitive practices.

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[4] Their position would be little different from the cable operator who was permitted to originate or control programming on one or two channels. However, the television broadcaster's over-the-air channel would be counted as one of the one or two cable channels on which the system operator can originate or control programming.

[5] This would not include operation of cable system "head ends," switching or other functions not associated with actual signal transmission.

Industry Structure: Programming

> *Recommendation 5:* The development of new programming and other information services that can be offered over cable should not be impeded by government-established barriers to the consumers' opportunity to purchase those services.

At present, the range of information and entertainment available in television is quite limited. In many instances, the viewer in prime time may choose from among only three network programs, one educational television program, and perhaps one more program, which may well be a network rerun, offered by a local station not affiliated with a network. Because most of these programs are designed to attract as large an audience as possible, they are often geared to the lowest common denominator of viewers' interest.[8] There are few opportunities for the viewer to see programs of special interest or emphasis even though that "special" interest may appeal to millions of people over the course of a week or a month. Moreover, the limited number of broadcast television outlets reduces television's utility to advertisers who wish to reach only a particular segment of the mass audience. The high cost of the relatively scarce TV broadcast advertising time makes it uneconomic for such advertisers to purchase commercial time.

With cable, the quality and diversity of advertiser-supported programming can be expected to be greater than it is now with television broadcasting. Cable's larger number of channels means advertising time will not be as costly as it is in television broadcasting, and this alone could attract more advertisers. Advertisers could also avoid the need to pay for exposure to audiences they have no interest in reaching and could support on a regular basis new types of programs appealing to limited audiences.

While increasing the overall magnitude of advertiser-support of cable programming is important to both the viewers and the advertisers, full opportunity for the viewer to express the intensity of his program preferences, and to satisfy those preferences, can be assured only if the consumer also is able to make direct payments for television programming, as he does for magazines, books, and records.

The Committee recognizes that there are some valid concerns regarding the growth of subscriber-supported programming or "pay-TV." It is argued that some people may not be able to afford to purchase information or entertainment in the quantity they may desire. This is true; just as it is true that some people cannot now afford to buy as many books, magazines, newspapers, or records as they might like. But the creators of programs and other information services should not be prohibited from selling to anyone but broadcasters and advertisers; to do so would deny to the public many services and benefits obtainable in no other way. Especially in the constitutionally protected media, the problem of poverty should not be dealt with by governmental restrictions of the range of choices open to consumers. Moreover, from the standpoint of the poor, pay cable may be regarded realistically not as a more expensive form of television, but as a cheaper form of motion picture theater, sports arena, or concert stage entertainment. They may be able to purchase more of this type of entertainment programming over cable than they could otherwise afford.

Another frequently voiced concern is that some of the programs presently supported by advertisers may be withdrawn from "free" television to be sold instead directly to viewers. The FCC now has rules forbidding direct sale to viewers of certain types of sports programs, feature films, and other entertainment programming to prevent this program "siphoning." Of course, viewers already pay indirectly for advertiser-supported television since the costs of advertising are reflected in the products they purchase. Nevertheless, if programs once financed by advertisers must in the future be paid for directly by viewers, there will be a measure of discontent, which makes the issue both emotionally and politically charged.

Television broadcasters have already sounded the alarm in the press and in the Congress, arguing that program siphoning by "pay cable" will exacerbate the audience fractionization that they expect cable's abundance of channels to produce even without such programming. They maintain that cable's competition for the viewing audience will diminish the total advertising revenues now flowing to broadcast television and sharply reduce the profitability of their business. They claim that their profits are used to underwrite news and public affairs programs and to produce costly, high-quality entertainment programs, all of which would be sharply cut back in response to cable's competition for programs and audience.

This line of argument assumes that news and public affairs programs, as well as high-quality entertainment programs, cannot be self-sustaining through advertiser support or a combination of advertiser and subscriber support. This assumption is questionable. There is no doubt that the networks and individual television stations perform a valuable public service in their information programs. If it is true that no other entity is capable of matching the broadcast networks' scale of national and international news coverage, there will continue to be advertiser and subscriber dollars available to support the networks' news and documentaries. At the same time, cable's abundance of channels and lower programming costs appear likely to lead to the emergence of additional news and public affairs programmers offering specialized or in-depth analysis to supplement the general coverage.

More generally, there can be a mixed system of advertiser and subscriber support for television programs; the two means of support can coexist in the electronic media as they do in newspapers, magazines, and other print media.

We anticipate that the broadcast media will continue to find advertisers who wish to reach the largest possible audience and are willing to continue to support the present kinds of mass-appeal programming. At the same time, some national and local advertisers also will be attracted to the relatively smaller audiences that could be reached by sponsoring programs that appeal directly to those audiences. Cable would thus provide a wider choice of advertiser-supported programs than now exists. Moreover, other advertisers, who wish to reach audiences with special interests but cannot afford the high cost of broadcasting's limited advertising time, can be expected to underwrite "free" programs on cable.

By definition, most of the time most of the viewers will be watching general-appeal entertainment programs. This type of programming will continue to attract sufficient advertiser support, and people will pay only to see those programs that do not attract such support. Therefore, it is likely that most of the cable channels used for subscriber-supported programming will be devoted to special interest programs not available on advertiser-supported broadcast or cable channels or to repeating mass appeal programs at off-hours. This conclusion is important, not only for its implications of expanded consumer choice, but also for its promise of additional sources of revenue for the performing arts, public and private education, and for the television program production industry.

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[8] This is not meant to be a criticism of the intellectual or artistic quality of television programming, but simply a recognition of the effect upon programming of channel scarcity and the vertical integration of TV broadcasting. It is unlikely that very many Americans are reading Shakespeare's works at any given hour either, but our print media — unlike broadcast television — makes them economically available in such a fashion that we can read them when we choose to do so.

If the performing arts are to remain a vital part of our national life, they must be able to tap substantial new sources of funding. The expanded electronic box-office provided by subscriber-supported cable could be a major source of assistance. Public and private educational institutions could also derive additional revenues by offering vocational education, continuing and specialized education, and university extension courses over cable systems. Furthermore, the television program and motion picture production industries could be revitalized by subscriber-supported cable.

However, there may be a need to preclude the possibility that one type of mass audience appeal programming might shift to pay television. If there were no restraints, some popular professional sports programs might be "siphoned" from advertiser-supported television. In view of the congressional exemption of the professional sports leagues from the antitrust laws and the recent legislation barring the "free" television blackout of sold-out home games, sports programming stands on a different footing from all other entertainment programming on advertiser-supported television. Given the unique nexus between such programs and congressional policies, the Committee recommends that the FCC continue to apply some anti-siphoning restrictions concerning professional sports programs, until the Congress determines that they are no longer appropriate.

However, there is no need in the long-run for such restrictions on other forms of entertainment programming. The anticipated competition and flexibility in cable programming will make unnecessary and inappropriate any sweeping Government restrictions on the public's right to purchase a wide variety of information and entertainment services and on the originator's right to sell such services.

> *Recommendation 6:* The programming, information or other services provided over cable should not be subject to administrative regulation of content, nor should the prices of such services be regulated by any governmental authority.

Administrative regulation of broadcast programs has been sanctioned by the Supreme Court on the grounds that it assists in achievement of First Amendment goals under conditions of vertical integration and a scarcity of broadcast frequencies. But with no use of the public airwaves, with a large number of channels, and with implementation of the separations policy, there is no need to resort to governmentally-imposed approximations in the cable medium. Under such conditions, use of the Fairness Doctrine, the equal time rule, and other forms of program content control to regulate what the audience can or must see and hear would simply be an end in itself — an unconscionable choice for a free society.

The absence of administrative regulation of the content of cable communications, however, need not and should not remove local, state, and Federal sanctions on pornography, libel, criminal incitement, and the like. Indeed, the Committee believes that additional safeguards may be necessary. The Government can and should vary its regulation of the communications media according to their particular characteristics. Cable systems are analogous to the mails and broadcasting in that they serve the consumer in his home where, without adequate safeguards, children may have easy access to the material distributed over cable channels. But the postal laws appear to provide a better example than the broadcast laws of the type of additional safeguards that may be needed.

We recommend that the law provide safeguards to allow for selective control over reception of programs and other communications that are not desired by the recipient, enabling the individual to enforce his own standards of obscenity or violence without the need for extensive prior restraint. Such safeguards could include sanctions against the distribution of certain material to cable customers who have indicated they do not wish to receive it and requirements that the nature of certain programs be clearly identified, so that the subscriber can decide whether to accept them.

Cable technology permits individual choice in filtering out undesired communications through scrambling codes, locked channels, and other devices. Once such protective mechanisms are in place, more latitude could be allowed in programs presented over the cable medium than over the broadcast medium.

In addition to precluding administrative regulation of program content on cable channels, the Committee recommends that there be no regulation by any governmental authority of the prices charged to subscribers for information, programming, and other services by channel users. As discussed above, provision of programming and information services should be a highly competitive activity. There should be no need for any governmental authority to regulate the prices of such services. Moreover, Government regulation of such prices inevitably would lead to regulation of program and information content, since rate regulation would ultimately have a bearing on the nature, quantity, and quality of the services being sold. For similar reasons there should be no requirements that certain programs or information services be provided free of charge by channel users or cable operators.

> *Recommendation 7:* Incentives to create programming for cable should be fostered by full applicability of the copyright laws to cable channel users.

There will be a steady supply of programming for presentation on cable channels only if there is a full range of financial incentives for the creators of programs. Both equity and the incentives necessary for the free and competitive supply of programs require a system in which program retailers using cable channels negotiate and pay for the right to use programs and other copyrighted information. Individual or industry-wide negotiations for a license, or right, to use copyrighted material are the rule in all the other media and should be the rule in the cable industry.

As a matter of communications policy, rather than copyright policy, the program retailer who distributes television broadcast signals in addition to those provided by the cable operator should be subject to full copyright liability for such retransmissions. However, given the reasonable expectations created by current regulatory policy, the cable operator should be entitled to a non-negotiated, blanket license, conferred by statute, to cover his own retransmission of broadcast signals (see note 2, page 10).

Institutional and Jurisdictional Framework for Cable Regulation

The preceding recommendations have dealt with the structure of the cable distribution and programming industries. This section sets forth the Committee's proposals for the requisite federal-state-local governmental relationships regarding cable regulation.

Since the general thrust of the Committee's recommendations involves far less detailed administrative regulation than has existed in broadcasting, we considered carefully the question of why cable systems have to be regulated at all. There are three reasons usually given: (1) a cable system is a natural monopoly in its service area, and as such, should be regulated to preclude abuses that competition would normally prevent; (2) virtually all cable systems are integral parts of the interstate distribution of programming and other information services, and some regulation of the transmission medium is necessary to assure system compatibility and interoperability; and (3) since cable systems compete with broadcast stations and could compete for some services with telephone companies, there should be parity of regulation among the competitors.

The third reason relies on a distorted notion of equity, which would justify pervasive and detailed regulation of cable simply for the benefit of cable's competitors. The first two reasons are valid, but they justify only a limited degree of regulation, quite different from the type that is usually considered in the telecommunications field.

Cable is an integral part of the interstate movement of electronic communications, and this relationship to interstate commerce provides adequate legal authority for the Federal Government to establish uniform conditions or minimum standards to which non-Federal action must conform.

However, the existence of Federal authority does not resolve the question of how to determine the most effective combination of national and local regulation. Federal authority could conceivably occupy the entire field, but this would be an unwise course, even if the Federal Government were somehow able to cope with the administrative burden of regulating thousands of cable systems across the country. State and local governments have an important interest in the construction and operation of cable systems, and they can best provide regulation responsive to local needs. Consequently, the Committee has concluded — as has virtually every other body that has grappled with this issue — that there must be a carefully structured dualism of governmental oversight.

> *Recommendation 8:* The Federal Government's authority over cable should be exercised initially to implement a national policy; thereafter, detailed Federal administrative supervision should be limited to setting certain technical standards for cable and applying anti-siphoning restrictions on professional sports programming.

The policy we recommend calls for use of Federal authority over cable solely as a means of achieving the national policy goals that we have identified. But Federal authority need not and should not intrude into all aspects of cable operations, as has happened in other fields of Federal regulation.

The Federal Government would exercise jurisdiction only over those aspects of cable operations that require uniform national treatment. The most important policies in this regard are the separations policy; the prohibitions on rate of return regulation of cable operators and on rate regulation of channel users; the anti-siphoning restrictions on pay cable presentations of professional sports programming; certain privacy safeguards; copyright liability; and other policies concerning industry structure in the cable transmission and programming fields.

Most of these policies do not require the day-to-day supervision of a Federal regulatory agency, but rather the uniform and consistent treatment that generally can be derived from enforcement in the Federal courts. For example, the Department of Justice and private parties could seek enforcement of those aspects of the policy that depend on the antitrust laws for their implementation (such as prevention of abusive cross-media and multiple-system ownership, anti-competitive joint use of interconnection facilities and cable systems, etc.), and those that involve constitutionally and legislatively protected rights (such as free speech, nondiscriminatory access to channels, and privacy).

The only aspects of cable regulation that appear to require continuing supervision by a Federal agency are enforcement of technical transmission or distribution standards and the sports anti-siphoning restrictions. The mandatory technical standards, however, should be limited strictly to those that are necessary to make cable systems interoperable and compatible with the equipment required to transmit and receive cable signals, as well as those necessary to protect individual privacy in cable communications (see page 13 of this Chapter). The Committee recommends that the function of establishing and enforcing technical standards be performed by the FCC, but this function should not be used as justification for cable licensing, rate regulation, or other control over industry operations or practices.[7]

> *Recommendation 9:* Franchising authorities should have the principal responsibility for the regulation of cable systems.

At present, overlapping local, state, and Federal jurisdiction over cable has led to the consideration or imposition of inappropriate forms of regulation. The FCC has dealt with some of these jurisdictional problems, but the comprehensive resolution of all of them will best be achieved through early enactment of Federal legislation to assure that non-Federal regulation is compatible with the overall national policy for cable. Federal legislation should establish the jurisdictional framework, but as a general rule, the non-Federal franchising authority should have the principal responsibility for regulation of cable systems. Use of the franchising process to exercise reasonable oversight of cable will avoid the continuing burden and bottlenecks of day-to-day supervision of system operations that could result from Federal or non-Federal regulation of cable by an administrative agency.

At present, the cable franchising function is performed by municipalities and other local governments. The Committee believes that the local levels of government should continue to exercise this vital function, since they are the authorities most closely attuned to local conditions and needs affecting cable system construction and operation. But it would not be appropriate for the Federal Government to assign responsibilities for governmental supervision of cable directly to municipalities. The decision regarding whether states or localities will perform franchising functions must be left to the states, although we strongly urge that the local governments retain such authority and functions.

This is not to say, however, that there should be no role for the states. The state governments are in the best position to assure that cable systems provide substantial public benefits and do not abuse their natural monopoly positions. States could provide overall guidance and assistance to local authorities in their franchising activities, and establish minimum requirements regarding safety of cable system construction and operation. If ultimately required, states could also oversee the reasonableness of customer connection charges and of channel leasing rates imposed by the cable operator and assure that cable systems and telephone companies compete fairly with each other and with other companies.

Within the regulatory structure we recommend, the franchising authorities would be subject to certain uniform conditions, standards, and guidelines intended to implement the national policy objectives for cable. The most important prohibitions and requirements to which state and local action must conform in order to achieve these objectives are as follows:

a. Prohibition on public utility-type rate-of-return regulation.

Rate-of-return regulation of the rates which cable operators charge channel users should not be imposed by any level of government unless there is a clearly defined need for it.[8] The need for such regulation may never arise, since the power of the operator to charge excessive rates for channel leasing would be held in check by the presence of competition from broadcast stations, telephone companies, or new technologies. More importantly, under the policy we have proposed, the cable operator would profit most in the long run by encouraging wider and more extensive use of his cable capacity. This should bring about an industry pattern of expanding cable capacity and facilities and lowering rates to stimulate increased usage. In any event, if cable operators were to evidence a pattern of limiting capacity and charging high rates, public utility regulation could then be imposed by the states. Such regulation would necessarily include both rate-of-return regulation and a requirement that the system add channel capacity upon reasonable demand. As with rate-of-return regulation, the expansion of capacity requirement should not be imposed until there is a clearly defined need for it.

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[7] We also recognize the responsibility of the FCC to set standards for spurious radiation from electronic equipment. However, these standards are not unique to cable.

[8] All regulation of rates and charges set by channel users for the provision of programming and other information services to their subscribers will, of course, be precluded.

b. Prohibition on grants of exclusive franchises.

There should be a prohibition on the grant of exclusive franchises for cable systems. While cable systems will be local monopolies because of technical and economic factors, there is no reason to erect legal barriers to competitive communications systems that may develop in the future or to other cable companies that could provide better service to the public than the cable system franchised initially. Even the possibility that the franchising authority might issue another franchise for the same area could act as a check upon the cable operator who was initially franchised.

c. Prohibition on use of franchise fees as general revenue raising devices.

Local authorities should not use the cable franchise as a means of raising general revenues, since revenue-raising franchise fees could dilute or remove the cable operators' incentives to expand services. Franchise fees, however, could be used to compensate the franchising authority for the costs of issuing and administering the franchise and for costs associated with the use of public rights-of-way. Moreover, the prohibition on revenue-raising franchise fees would not preclude local governments from imposing reasonable business taxes on the cable operator.

d. Prohibition on dedicated free channels.

Franchising authorities should be prohibited from requiring the dedication of special channels for governmental, instructional, and other special purposes. At present, FCC rules require that cable operators reserve one channel for educational use and one channel for local government use, and that these channels be made available without charge. Such specially designated and reserved channels served a purpose in the limited-channel, vertically-integrated environment of broadcast television. Such requirements are unnecessary in a cable industry operating under the separations principle, since educational and local government entities, along with everyone else, will have unfettered access to the cable system's channels. Moreover, such requirements inevitably invite franchising authorities to make value judgments and set priorities regarding the terms and conditions of using free channels. The interest of governmental, non-commercial, and nonprofit entities in low cost access to cable channels will be served adequately through the operation of the variable charge, leased-channel rate schedule discussed below.[*]

e. Requirement of adequate channel capacity.

To assure ample channel capacity for a variety of programming and other information service, the franchise should specify the number of channels that is considered to be adequate as a basic level of cable system capacity. The FCC presently requires that systems in the top 100 television markets be constructed with a minimum of 20 channels. Franchising authorities would be authorized to require channel capacity in excess of this minimum by negotiations with the prospective cable operator when the franchise is to be issued initially or reissued.

f. Requirement of non-discriminatory channel lease rates.

The franchise should require that the rates charged channel users by the system operator do not unreasonably discriminate among comparable channel uses and users. Disputes regarding the schedule of rates would be resolved by the courts, rather than the franchising authority.

There may be different rates charged for various times of the day, discounts for long-term or volume leasing of channel time or capacity, as well as different rates for various uses of the cable channels. For example, the highest unit rate for commercial use might be a percentage of the channel user's gross revenues received from subscriber-supported presentations of feature films, with flat rates charged for advertiser-supported programs; different rates could be used for utility company meter reading services or banking services.

The cable operator could also establish various pricing mechanisms for particular channel users. Channel users could be charged on the basis of each home subscribing to the particular program rather than charged a flat rate based upon the total number of homes connected to the cable system. In this way, special interest, public service, or instructional programmers could benefit from the economic base provided to the cable operator from channel users offering mass appeal programming.

In short, there are many ways that the cable operator could participate in the profitability of the programs offered by certain types of channel users, without undercutting the objectives of the separations policy. Furthermore, this would make possible lower rates for local governmental, educational, charitable, and other nonprofit organizations and civic groups.

g. Miscellaneous franchise provisions.

The jurisdictional framework for cable recommended by the Committee would allow franchising authorities to establish conditions dealing with the cable system operator's qualifications, construction timetables, extension of service to all portions of the franchise area, setting maximum limits on the rates charged by the system operator for cable installation and monthly service, handling of service complaints, and establishing other conditions not expressly prohibited by Federal policy.

The Consumer and the Cable

In one sense, a separate discussion of relationships between consumers and cable systems should not be necessary. The policy direction we have chosen is intended to remove technological, economic, and legal barriers to the flow of information between the public and those who wish to provide programs or other information services. Theoretically, once the absence of those barriers is assured there should be no further need for Government to intrude upon relationships between the cable operators and channel users, or between channel users and subscribers. In practice, there are bound to be problems which will require some affirmative governmental effort to deal with them.

The Committee, therefore, recommends that steps be taken to prevent the invasion of individual privacy that could otherwise arise in some uses of cable. Additional action may also be needed to assure that basic cable or other broadband communications facilities are available to residents of outlying rural areas or to the poor. However, some of these actions will not be necessary for many years, until problems arise, or may not be needed at all, if no problems arise.

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[*] We note, however, the growing interest in public access, in which a cable channel is used as a "soap-box" to allow members of the general public to participate in a community dialogue. We believe that such a cable channel can serve important goals of free expression. It would not be inconsistent with the policy stated above to maintain at the present FCC requirement that the cable operator provide the use of one channel without charge for such public access purposes, as long as this requirement is imposed and administered by the franchising authority. However, we recommend against earmarking a portion of the cable franchise fee to subsidize the use of the public access channel, since other public and private funds can be used for this purpose.

Recommendation 10: There should be strong legal and technical safeguards to protect individual privacy in cable communications.

There has been justifiable concern over the possible invasions of privacy posed by the development of cable. For example, remote monitoring services, such as automatic meter reading, may be used by unauthorized persons for clandestine surveillance. Unauthorized persons could also misuse confidential, personal information conveyed by cable to data storage or processing centers. Furthermore, commercial enterprises, and perhaps local governments, would be able to keep track of every program a person watches or any information service he or she uses. This could cause a substantial ''chilling'' effect on the flow of information as well as a serious erosion of privacy. New technology could also make it possible to address selectively each cable subscriber and provide the means to inundate him with unwanted information.

The Committee considers the individual's ability to safeguard his personal privacy to be one of the most important goals of a free society. The law and the traditions of a society based on the initiative, responsibility and privacy of the individual require that technology serve, not erode, this goal.

Therefore, we recommend the adoption of legal safeguards to allow individual control over undesired communications and intrusions into the home. These safeguards could include sanctions against the distribution of material which the subscriber indicated he does not wish to receive or which he has not specifically requested. In addition to these safeguards, the constitutional and ''common'' law of privacy would also apply to cable and should be adapted and enforced by the courts. Finally, cable lends itself to use of technical safeguards, such as scrambling codes and locked channels. The FCC, in conjunction with other government agencies, should develop and implement technical standards and requirements necessary to afford added protection of privacy in cable communications.

Recommendation 11: Governmental authorities should assure that basic cable or other broadband communications are available to residents of rural areas and to the poor.

Even though a majority of the homes in the United States may be wired for cable and cable may be providing programming and other information services in addition to retransmission of broadcast signals, many residents of outlying rural areas may not have the option of subscribing to cable. While it may eventually become economical for cable operators to extend facilities to these areas, this may be an instance in which sole reliance on the free market incentives of cable operators may not be adequate to meet certain national policy objectives, such as the widespread availability of information.

If this becomes a significant problem in the future, the Government should take affirmative action to assure a basic level of broadband communications service for residents of outlying rural areas. We recommend that the Secretary of Housing and Urban Development and the Secretary of Agriculture be directed to follow the development of cable in rural areas and make recommendations for such Government action as they deem appropriate.

There has also been concern expressed regarding the availability of cable to the poor in urban and rural areas. Cable operators may attempt to delay or refuse to offer their service to areas where there is high proportion of poor households. To meet this difficulty, franchising authorities should require extension of service to all portions of the franchise areas. While this may be viewed by some as a subsidy of the poor by the rich, it is not a subsidy that is unusual or very burdensome, and it could avoid the emergence of a class of citizens cut off from what could well become the information mainstream of the future. Furthermore, many governmental services directed to the poor may be provided inexpensively and most effectively by cable. Vocational training, adult education, preschool instruction, and public health information are examples of services that might be provided over cable with state or, in some instances, Federal funding. We recommend that the Secretary of Health, Education and Welfare be directed to examine the feasibility and cost of using cable to assist in the delivery of such services, to make such information available to the state and local governments, and to include use of cable channel capacity in Federally-funded programs when appropriate (see Chapter V).

Recommendation 12: Participation by minority groups in cable system ownership, operation and programming should be facilitated.

The development of cable represents a unique opportunity for minority racial and ethnic groups to become actively involved in a new communications medium. Minority groups should have not only employment opportunities, but also full opportunity to participate in all aspects of cable ownership, operation, and programming.

The general policy for the structure and regulation of the cable industry that we recommend would facilitate participation by all segments of society in cable ownership or control of channel use. Moreover, the local franchising authority should ensure opportunities for minority ownership and control in cable systems and programming.

At the Federal level, the Equal Employment Opportunity Commission should devote special attention to the development of the cable industry to assure ample employment opportunities for minority group members. We also recommend that the Office of Minority Business Enterprise and the Small Business Administration of the Department of Commerce be directed to give high priority to cable and to propose any necessary special provisions, such as loan guarantees, to foster significant minority ownership or control of cable operations.

CHAPTER IV

A TRANSITION PERIOD

> *"The almost explosive development of CATV suggests the need of a comprehensive reexamination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts."*
>
> *– Chief Justice Warren E. Burger*

The policy recommendations in Chapter III are designed to deal with a developed cable industry. Such a nationwide cable medium, used for a wide variety of information and entertainment services, will be far different from the cable industry today, which is oriented primarily to the retransmission of broadcast television signals and is a relatively small part of the nation's communications media.

The next decade of cable's growth will require large quantities of long-term capital to finance construction of transmission facilities and more speculative risk capital to finance programming and other service ventures. Without the opportunity for adequate financial rewards, entrepreneurs will lack the necessary incentives either to construct systems in major cities, or to develop a wide range of services that use cable channels.

The Committee is aware that there are those in the cable industry and the financial community who fear that cable will not grow at all unless the cable operator is allowed to program his own channels in order to attract subscribers and maintain an adequate short-run cash flow. This concern rests on the questionable assumption that no one but the cable operator has sufficient incentives to develop the new programming that will be needed to attract subscribers in major cities. However unwarranted these fears may be, the immediate adoption of the separations policy could prompt many potential investors to avoid the cable industry, causing cable to fall prey to a self-fulfilling prophecy of failure.

Nonetheless, the Committee believes this is the proper time to agree upon a broad long-range public policy for cable communications which reflects agreement upon the core principle of separating the control of the cable distribution medium from control of the programs or other information distributed by cable. Such consensus is needed in order to indicate the framework in which the cable industry is to operate and to diminish the uncertainty that has troubled cable entrepreneurs, investors, regulators, and customers during the past decade.

However, in order to facilitate the orderly development of the cable industry, the Committee recommends a transition period during which there would be a phased, evolutionary implementation and application of the new cable policy by the Federal, state, and local levels of government. Taking such an approach, cable development in accord with the new policy need not await congressional action. Although some of the Committee's policy recommendations would best be implemented by enactment of legislation in the immediate future, there is much that the Executive Branch, the FCC, states, municipalities, and private groups can do to implement the Committee's policy recommendations during the transition period.

Duration of the Transition Period

Specifying in advance the duration of the transition period on the basis of some measurement of the cable industry's maturity is a somewhat arbitrary but still necessary task. The Committee considered many possibilities, of which the two most likely were to:

(1) end the transition period at some predetermined future date, such as ten years after the initial aspects of the long-run policy are adopted; or

(2) end the transition period upon attainment of some objective criterion of "maturity;" such as the connection of some specific percentage of households to cable, either nationwide or in each franchise area.

There are several variations and combinations of these possibilities, and each has its strengths and weaknesses. Almost any approach that would end the transition at the same time nationwide could rather arbitrarily work hardships for particular cable operators or communities. Conversely, if the end of the transition period were based on homes connected to cable on a system-by-system basis, some cable operators might have an incentive to delay reaching the critical percentage and to forestall the separations policy through such tactics as charging excessive rates. This would be less of a problem if the overall nationwide rate of homes connected were used to measure the maturity of the cable industry.

On balance, the Committee believes that the most appropriate criterion to mark the end of the transition period is the point when the nationwide percentage of households connected to cable systems reaches about 50 per cent. As discussed below, however, the various franchising authorities should establish procedures for gradually loosening the operator's channel control in a manner most appropriate for each community, prior to achievement of the 50 per cent level nationwide. In this way, there would be ample local control over the rate at which each cable system became subject to the separations policy. Moreover, a viable national cable program supply industry could evolve in an orderly manner over the course of the transition period, rather than having to spring into existence full-blown at its end.

Transition Period Provisions

In cable's early years, the potentially adverse effects of its natural monopoly characteristics will be minimal. Therefore, the primary purpose of the transition period is to postpone the full application of the separations policy, and the other long-range policy recommendations that flow from it, until the cable industry approaches maturity, when such policies will be both necessary and appropriate.

Accordingly, during the transition period, cable operators should be permitted to offer programming directly or to have financial or other interests in the programming and other services offered over their systems. At the end of the transition for the particular system, the cable operator would be required to certify to the franchising authority that the sales, trades, and other divestiture arrangements have been made to assure full compliance with the separations policy.

Before the full separations principle is in effect, cable operators may have economic incentives to limit channel capacity in order to enhance the value of the channels under their control. Therefore, to assure from the outset a reasonable number of channels available for lease to others, franchising authorities should be required by Federal policy to specify that cable systems make available for lease one equivalent channel for each channel used by the cable operator for program originations and for retransmission of broadcast signals. Moreover, the franchising authority should establish a pattern of gradual lessening of the cable operator's control of channels by increasing the proportion of channels to be leased to others over the course of the transition period.

Without the protection of the separations policy, the dangers inherent in allowing cross-media ownership (newspaper, magazines, broadcast stations) of cable systems will have to be dealt with in some other fashion. Therefore, certain types of cross-media ownership of cable systems should be prohibited until the end of the transition. The FCC's present cable rules prohibit the television broadcast networks from owning cable systems and preclude television broadcasters from owning such systems within their stations' service areas. These rules should remain in effect during the transition period, but there should be no divestiture required for existing cross-media ownership combinations. No other cross-ownership rules should be adopted.

The Committee also recommends against imposing multiple system ownership restrictions by the FCC during the transition. The dangers of excessive multiple ownership can be adequately controlled through application of the antitrust laws, tempered by the usual ''infant industry'' antitrust enforcement practices that have been found to be in the public interest.

Finally, during the transition period, there should be some limitations on the type of programming now available on advertiser-supported television that could be offered for a fee on cable systems. The FCC's present ''anti-siphoning'' rules are intended to preserve a basic level of advertiser-supported sports and entertainment programs on over-the-air television. While a mixed system of subscriber-support and advertiser-support for programs will provide the greatest choice and diversity for consumers and should not be restricted by government in the long run (see Chapter III, Recommendation 5), we recognize that some aspects of this policy are not appropriate for the transition period. For example, if some popular programs were ''siphoned'' from advertiser-supported TV while relatively few households were connected to cable, some viewers might be deprived of a program on broadcast television before they had access to it on a cable channel.

As discussed above, many provisions of the transition period will end for some cable systems prior to the time when the number of homes connected to cable reaches 50 per cent nationwide, if the franchising authorities so determine. However, siphoning is a national concern and removal of restrictions should not be left to the discretion of franchising authorities. Therefore, we recommend that some restrictions on siphoning be administered by the FCC for the full transition period, and be made applicable against whomever is providing subscriber-supported programming during that period, whether it is the cable operator or a channel programmer not affiliated with the cable operator. However, the FCC's current ''anti-siphoning'' rules are quite complex. We do not endorse these particular rules, but we recommend that the FCC have the authority to adapt reasonable anti-siphoning provisions to the changing conditions in the broadcast, cable, and programming industries, selectively lessening the restrictiveness of the rules.

At the end of the transition period, there should be no siphoning restrictions except those applying to the ''pay'' presentation of professional sports events. As noted in Chapter III, the Committee feels that the Congress should determine the most appropriate time to lift such restrictions on professional sports programs, given the close relationship between such programs and congressional policies regarding the antitrust exemption for sports leagues and the ''blacking-out'' of sold-out home games.

There should be no additional administrative controls on program content on cable channels. Thus, the equal time provisions of the Communications Act, the Fairness Doctrine, and public service program requirements should not apply to programming originated on cable during the transition period or in the long run. It is essential from the outset that the use of the cable medium for distributing programs be free from administrative regulation of content.

Evolutionary Implementation

The Committee believes that the long-range and transitional steps we recommend should evolve in a number of steps along two broad fronts: division of regulatory authority and adoption of long-range policy. While we strongly believe that the Congress should establish the principles of the new cable policy, virtually all of the steps described below could be taken by the FCC, either independently or in conjunction with franchising authorities, if the Congress fails to act.

a. Division of regulatory authority

The first step in the evolutionary plan, which should be taken immediately, is to divide regulatory authority over cable between the Federal and non-Federal levels, as discussed in Chapter III, Recommendations 8 and 9.

The FCC would keep in effect its present cable rules, except for removal of the requirements regarding: (1) mandatory program originations; (2) application of the Fairness Doctrine, equal time provisions, and similar kinds of program content requirements to cable program originations; (3) reservation of a public access channel, which would be left to franchise requirements; (4) specification of a basic level of channel capacity to be leased to others, which would also be left to franchise requirements; (5) designation of educational and local government channels; (6) expansion of channel capacity; and (7) specification of two-way channel capacity. Existing cross-media ownership of cable would be allowed to continue, but the FCC would maintain its present rules forbidding cable system ownership by television broadcast stations in their own markets and by television networks nationwide.

The FCC would also be prohibited from adopting multiple system ownership rules for cable and from imposing rate of return regulation on cable operators or any form of rate regulation on channel users. The common ownership or control of cable systems, interconnection facilities, and program supply services would be prohibited (Recommendation 2), as would the ownership of cable systems by telephone common carriers in their service areas (Recommendation 4). The FCC would adapt its present ''anti-siphoning'' restrictions on cable programming to reflect changing conditions in the broadcast, cable, and programming industries.

With respect to the franchising authorities, Recommendation 9 would be fully implemented. Thus, there would be prohibitions on rate-of-return regulation of cable operators; on rate or program regulation of channel users; on granting exclusive franchises; on use of franchise fees to raise general revenues; and on requirements for special-use, dedicated channels or free service. There would also be franchise requirements that lease rate schedules do not unreasonably discriminate among comparable channel uses or users, that system operators have adequate channel capacity, that system operators make available for lease to others at least one equivalent channel for every channel used by the operator for retransmission of broadcast signals or for program originations, and that one channel be made available for public access purposes. Furthermore, franchising authorities would have specific authority to control the rate of progress to full application of the separations policy by increasing the proportion of channels to be leased to others.

The Committee believes that prompt action by the Congress to divide regulatory authority over cable is especially desirable. The necessary consensus on a national cable policy could be reflected in a preamble to such legislation. While the preamble would not have the force of law, it would establish the separations principle as the goal for subsequent regulatory and legislative action by all levels of government. This would give the industry, the public, and governmental authorities a clear indication of where cable is headed and what the industry structure and government regulation is likely to be. This would facilitate planning by the cable industry and the investment community and greatly ease the subsequent evolution to a full separations policy.

b. Adoption of long-range policy

Implementation of the balance of the Committee's long-range policy recommendations and termination of the special transition provisions require the following actions effective at the end of the transition period:

1. Limitation of FCC authority to enforcement of technical standards and of restrictions on charging viewers for professional sports programs.

2. Removal of restrictions on joint ownership of television stations and cable systems in the same market and on television broadcast network ownership of cable systems.

3. Adoption of appropriate privacy safeguards.

4. Implementation of special provisions regarding availability of cable services to residents of rural areas and to the poor.

5. Requiring cable operators to divest themselves of activities not in compliance with the separations policy.

Ideally, these provisions would be enacted by the Congress to become effective at the end of the transition period. However, certain provisions, such as those regarding privacy and residents of rural areas and the poor, might become effective before the end of the transition period. If the Congress failed to act before the end of the transition period, the FCC, other government agencies, and the franchising authorities could still implement most of the long-range policy provisions.

CHAPTER V

A DEMONSTRATION PROGRAM

"We have proposed a Federally supported program to demonstrate innovative public service uses of cable technology and to identify more precisely the technical and legal safeguards necessary to protect personal privacy in the use of cable."

The Committee's basic concerns about the free flow of information led us to recommend a regulatory framework in which Government is neutral with respect to the nature and content of the messages distributed over the cable. Thus, the Government would not have regulatory mechanisms to require public interest uses of cable as it does in broadcasting. At the same time, the Committee recognized the potential of using cable for public services that traditionally are promoted or provided by Government agencies. We feel there is a need for the Government to make sure that this potential is fully explored and realized. We are concerned that relying solely on the commercial marketplace for the development of cable services may cause commercial applications to outstrip the development of public services. Unless cable's use for public services is thoroughly explored and developed early in cable's growth, the introduction of such services may be greatly delayed or thwarted.

Moreover, the Committee is convinced that legal and technical safeguards needed to protect individual privacy must be developed and evaluated before cable growth is so extensive and cable facilities and practices are so firmly entrenched that the appropriate safeguards cannot be adopted without major opposition, disruption, and expense.

Finally, there is a chicken and egg problem hampering the development of many valuable services that might be commercially viable. The demand for these services depends heavily on their availability, yet few potential suppliers are willing to accept the risk of developing new services without significant evidence of a market demand for them. Similarly, while each new cable service would require relatively expensive special facilities if offered alone, these services can be aggregated and the requisite facilities can be combined so that these costs can be shared, but no one has emerged to lead and coordinate such a joint effort.

The Committee believes the Federal Government has a responsibility to help identify the public services that can best be provided via cable communications and to evaluate appropriate privacy safeguards. The committee has concluded that the most effective way to achieve these objectives would be through a Federally-supported effort. Consequently, we recommend consideration of a systematic demonstration program involving Federal, state, and local government agencies, appropriate public and professional groups, and the cable and electronics manufacturing industries. The experience gained from this program would reduce the lead time needed to develop many desirable public service uses of cable and facilitate their widespread implementation with greater effectiveness and efficiency. The demonstration program would also make it possible for private users to test the feasibility of various new services at their own expense, offsetting some of the cost of testing public service applications.

Description of the Proposed Demonstration Program

Although the Committee did not attempt to establish the precise characteristics of the demonstration program, it did consider the program's basic structure and overall objectives.

It is important that the demonstration program be carefully delimited in both geographic scope and duration in order to assure that the program does not constitute a widespread or continuing subsidy for the cable industry or a vehicle for government propagandizing over cable.

Governmental funds should be used only to support the purchase of advanced terminal equipment and to underwrite certain of the costs of the public service aspects of the demonstration. We expect that much of the system equipment and facilities, including the cable transmission system needed for the demonstration program, would be financed by the private sector or would consist of existing systems in a number of representative communities.

Participants in the program should include the Department of Health, Education and Welfare; the Department of Housing and Urban Development; the Environmental Protection Agency; and other Federal agencies which provide direct service to the public. State and local governments should be involved in the selection of demonstration services and sites, as well as in operational aspects of the program. And both private and public institutions should share in designing and providing services and in conducting related experiments.

Federal support for the program should run for no more than five years, with actual on-site demonstrations beginning as early as the second year. Systematic evaluation plans should be incorporated into each of the experimental efforts so that information will be available to guide the development of other experiments. All public and private institutions that participate in the demonstration program, including those who do so at their own expense by paying projected commercial rates for channel leasing and facilities, should be obliged to agree that all evaluation and experimental data will be made available to the public.

Some examples of types of service that have been suggested to the Committee as appropriate for the demonstration program are:

- Adult education courses and university extension instruction could be provided to individuals in their homes at times most convenient to them and in a manner tailored to their particular needs. These could include cable transmission of high school equivalency programs, vocational training, and college course work offered in conjunction with particular colleges and universities.
- A broad range of medical and public health information and services could be delivered to people in their homes, and channels could be used to enhance the professional training of doctors and para-medical personnel.
- State and local agencies could use the demonstration program to develop improved services for the collection, storage, and retrieval of a wide variety of local government information, including office hours, where-to-go for various services, and municipal code enforcement.
- Similarly, environmental agencies could experiment with cable in improving the effectiveness of their activities, including the monitoring, control and enforcement of air pollution standards, pollution health warnings for people with special sensitivities, and similar activities.
- Various businesses may wish to use facilities to test the feasibility of offering such services as use of the cable subscriber's home terminal to select and order goods from department store catalogues; to order tickets for transportation, entertainment, and cultural events; for home use of computer processing networks; for banking transactions; for files and record maintenance; and for electronic mail delivery.

CHAPTER VI

SUMMARY OUTLINE OF RECOMMENDATIONS

> ***"The Committee has concluded that programming, advertising, and other information and services on cable channels can be allowed to develop on a free and competitive basis, with no more regulatory power exercised over the content of this communications medium than is exercised over the print or film media."***

The following sections A-E constitute a summary outline of the Committee's long-range recommendations (Chapter III) as they affect cable operators, channel users, telephone common carriers, the FCC, and the franchising authorities. The exceptions to those recommendations, which would apply during the transition period (Chapter IV), are summarized in section F.

A. Policies Affecting Cable System Operators

1. Operators should be REQUIRED to:

a. Offer their channels, or time on their channels, for lease to others for any lawful purpose, and without discrimination among comparable uses and users (pp. 10-13, 15),[1] with the exception of the channels used for retransmission of the broadcast signals authorized for carriage by the FCC's cable rules, plus one or two additional channels. The FCC's rules regarding broadcast signal carriage will apply to channels used for retransmission of the broadcast signals (note 2, p. 10).

b. Comply with Federal and franchising authority requirements to construct cable systems with adequate channel capacity (p. 15).

c. Comply with the minimum technical standards established for cable distribution by the FCC (p. 14).

d. Offer customers a selective means to control or prevent reception of programming or information services which the customer does not wish to receive, and to prevent interception of personal or confidential information distributed over cable (pp. 13-14).

2. Operators should be ALLOWED to:

a. Own and operate other media outlets such as newspapers, magazines, or broadcast stations or networks including those within the same market area as the cable system (p. 11).

3. Operators should be PROHIBITED from:

a. Having any financial or ownership interest in, or any control of, the production, selection, financing or marketing of the program or information services supplied by channel users leasing the operators' distribution facilities (p. 10); with the exception noted in section A.1.a.

b. Participating in the joint ownership or control of cable systems, interconnection facilities, and program supply services (pp. 10-11).

B. Policies Affecting Program Retailers and Other Channel Users

1. Channel users should be REQUIRED to:

a. Adhere to all applicable provisions of copyright laws and accept full liability for any program materials or information services they may supply (p. 13).

2. Channel users should be ALLOWED to:

a. Lease channels or obtain other distribution services from any cable system with which they have no financial relationship or other form of common interest or control — with the exception noted in section A.1.a. — and offer to the public any lawful program materials or information services via such system (pp. 10, 13).

b. Establish such charges as they consider appropriate for the programming or information services they supply, without regulation by Federal, state, or local authorities (p. 13).

c. Have legal recourse against any cable system operator: (1) who denies access or discriminates against the channel user by reason of the content of the user's message or the user's race, religion, nationality, or beliefs; or (2) who otherwise engages in practices that violate the requirement of non-discriminatory channel lease rates (p. 15).

3. Channel users should be PROHIBITED from:

a. Providing any information or taking any action in violation of relevant laws and statutes protecting privacy and governing dissemination of obscene, libelous, or otherwise illegal material, as well as material the cable customer has indicated he does not wish to receive (p. 13).

b. Requiring viewers to pay a fee for professional sports programming unless consistent with the FCC's anti-siphoning restrictions (p. 13).

C. Policies Affecting Telephone Common Carriers

1. Common carriers should be REQUIRED to:

a. Provide pole, conduit, or other right-of-way access to any franchised cable system operator at reasonable rates and without discrimination among users or uses (p. 11).

2. Common carriers should be ALLOWED to:

a. Offer local cable distribution service on a "lease-back" basis to any franchised cable system operator (p. 11).

b. Obtain franchises to operate as cable system operators outside of any area in which they have exclusive authority to provide telephone service (p. 11).

3. Common carriers should be PROHIBITED from:

a. Owning, controlling or operating any cable system within their telephone service areas, *i.e.*, performing any function not associated with actual signal distribution, such as the operation of cable system "head-ends" used for information origination, reception, conversion, switching, or other processing functions (p. 11).

D. Policies Affecting the Federal Communications Commission (FCC)

1. FCC should be PERMITTED only to:

a. Establish minimum technical standards for cable distribution systems, only as needed to ensure compatibility, interoperability, privacy and security of cable systems (p. 14).

b. Require that cable systems be constructed with adequate channel capacity (p. 15).

c. Apply restrictions to the presentation for a fee of professional sports programs (pp. 13, 14).

2. FCC should NOT BE PERMITTED to:

a. Regulate in any way the information content of any services carried by cable system, including any regulations as to the balance or "fairness" of such information (p. 13).

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[1] All page references are to Chapter III, except where otherwise indicated.

b. Require minimum channel capacity to be leased to others; designate special purpose channels; require expansion of channel capacity or construction of two-way capacity (Chapter IV, p. 18).

c. Regulate the rates or earnings of cable operators or channel users, or require any free service (p. 13).

d. Limit, by regulation or policy, the ownership of cable systems by broadcast stations or networks, or by newspapers, magazines, or other media outlets, or limit the number of cable systems to be owned by one firm or the number of customers to be served by one firm (p. 11).

E. Policies Affecting Franchising Authorities

1. Franchising authorities should be REQUIRED to:

a. Award non-exclusive franchises for the use of public rights-of-way by cable systems, and collect franchise fees for such use to the extent the fees merely compensate for the costs of regulation or costs incurred in the use of the public rights-of-way (p. 15).

b. Require that the rates, terms, and conditions, for channel leasing, not unreasonably discriminate among comparable channel uses and users (p. 15).

c. Require that the cable operator make available one channel to be used for public access purposes (note 9, p. 15).

d. Require, through negotiations with prospective cable operators, that cable systems be constructed with adequate channel capacity (p. 15).

2. Franchising authorities should be PERMITTED to:

a. Set maximum limits on the rates or charges imposed on customers for cable installation (p. 15).

b. Establish franchising conditions dealing with the cable system operator's qualifications; construction timetables; extension of service to all portions of the franchise area; handling of service complaints; and other conditions not expressly forbidden to franchising authorities (p. 15.)

3. Franchising authorities should NOT BE PERMITTED to:

a. Regulate the information content of any service carried by a cable operator including any regulation as to the balance or "fairness" of such information (p. 13).

b. Award exclusive franchises for cable systems or require dedicated free channels for special purposes (p. 15).

c. Impose franchise fees on cable systems, when the primary purpose is to raise revenues (p. 15).

d. Regulate the rate of return or earnings of cable operators or the rates charged by program or information suppliers to their subscribers (pp. 14-15).

F. Transition Policies

The following exceptions to the long-range policy recommendations would apply during the transition period, which would end when 50 per cent of the nation's households were connected to cable systems (Chapter IV, p. 17).

1. Cable operators would be exempt from the prohibition on offering programming directly or having financial or other interests in the programming and other services offered over their systems (Chapter IV, p. 17).

2. Franchising authorities would have to require cable operators to:

a. Make available for lease to others at least one equivalent channel for every channel used by the cable operator for retransmission of broadcast signals or for program originations (Chapter IV, p. 18).

b. Establish a pattern of gradual lessening of the cable operator's control of channels by increasing the proportion of channels to be leased to others (Chapter IV, p. 18).

3. The Federal Communications Commission would continue to:

a. Prohibit future ownership of cable systems by television broadcast networks and by television broadcast stations in their station service areas (Chapter IV, p. 18).

b. Apply restrictions on the type of entertainment programming that can be offered to cable system customers for a fee and adapt such restrictions to changing conditions in the broadcast, cable, and programming industries (Chapter IV, p. 18).

APPENDIX

Current Regulatory Framework[1]

At first the cable television industry was regulated only by local authorities, whose requirements were designed primarily to assure that cables were installed in a manner consistent with construction and safety codes. These requirements were similar to those applied to other users of city streets and rights-of-way.

In 1965, the FCC issued its *First Report and Order* on cable television in which it asserted jurisdiction over microwave-linked cable systems. The following year, the *Second Report and Order* broadened FCC jurisdiction to include all cable systems, whether or not microwave links were used. This jurisdiction was tested in the courts and affirmed by the Supreme Court in 1968.[2]

The *Second Report and Order* also imposed restrictions on bringing "distant" television signals[3] into the top 100 markets. This constraint resulted in a virtual freeze on cable development in the nation's major urban and suburban centers, since cable operators believed that they would be unable to attract customers without offering distant signals in areas that already had good local broadcast TV reception.

In 1972, the Commission issued its *Third Report and Order*, together with comprehensive rules and regulations which are reprinted below,[4] lifting some of the distant signal restrictions and imposing a number of other requirements for major market cable systems. Although the rules permit expansion of cable into major markets, they also contain restraints which are designed, in the view of the FCC, to limit the competitive threat to the existing broadcast industry and to stimulate the use of cable for non-broadcast services.

The rules require that each newly franchised cable system obtain a "Certificate of Compliance" from the FCC before it may begin to carry broadcast television signals. This permits the Commission to determine whether the local franchising process, the franchise agreement, and the design of the cable system are in compliance with FCC requirements. The certification process also permits the applicant as well as the franchising authority to request waivers of the FCC's requirements when sufficient justification can be demonstrated. This provides a degree of flexibility in structuring a franchise to meet each community's individual objectives.

A two-tier regulatory system exists today with the FCC regulating the areas of:

— Broadcast television and radio signal carriage
— Program exclusivity
— Channel capacity
— Cablecasting
— Operational procedures and requirements
— Minimum franchise requirements

At the same time, local authorities may regulate such items as:

— Selection of franchisee
— Subscriber rates
— Monitoring system's performance and compliance
— Operation of municipal channels

In addition, there appears to be a third tier of regulation developing at the state level. Although only a few states have enacted cable regulations so far, it seems likely that eventually almost all will exert some degree of authority.

In terms of the specific uses to which a cable system may be put, the current FCC rules establish minimum requirements and require capacity for development of new services. For new major market systems, the rules require the following "designated" services:

1. *Retransmission service:* Mandatory carriage of local broadcast television stations and permissible carriage of distant broadcast stations up to defined limits (usually one or two).

2. *Local origination service:* At least one channel, under the control of the cable operator, devoted to local, non-automated programming.

3. *Public access service:* One free channel for the use of the general public on a non-discriminatory, first-come, first-served basis.

4. *Educational access service:* One channel, free for at least five years, reserved for use by local educational authorities.

5. *Government access service:* One channel, free for at least five years, reserved for government uses.

6. *Leased access service:* A number of channels available for lease to others who wish to provide new "undesignated" services via the cable.

In addition, the FCC's rules require a 20 channel minimum capacity. At least one channel must be available for non-broadcast use for each channel used to carry broadcast signals. Thus, if 12 broadcast signals are carried, the system must provide at least 24 channels.

With regard to two-way communication, the Commission has required only that the cable system be capable of eventually providing return "nonvoice" signals from the subscriber to the cable control center. No time schedule for implementing this capability, or for providing a wider range of two-way communication, is imposed.

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[1] Portions of this summary of cable regulations are reprinted from *The Uses of Cable Communications* with the permission of the Cable Television Information Center, The Urban Institute.

[2] United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

[3] Distant television signals are those that originate too far away to be received by ordinary home antennas.

[4] Editor's Note: Full text of Third Report & Order and Rules & Regulations were reprinted by Television Digest Inc. Feb. 3, 1972. Therefore, they are not reprinted below.

Attachment No. 5

Congressional Letters of Protest
and
Various Newspaper Articles

[illegible]
4th District, New York

Committee on Energy
and Commerce
Ranking Republican

Committee on
Merchant Marine and
Fisheries
[illegible]
Merchant Marine

Congress of the United States
House of Representatives
Washington, DC 20515

[illegible]
Washington, DC, Office
Unless Otherwise Indicated

Washington Office:
2408 Rayburn House Office Building
Telephone (202) 225-7896

District Offices:
☐ Room 300, 2280 Grand Avenue
Baldwin, NY 11510
Telephone (516) 223-1616

☐ Massapequa Park Village Hall
151 Front Street
Massapequa Park, NY 11762
Telephone (516) 795-4164

February 1, 1989

Mr. Charles Dolan
Cablevision Systems Corporation
One Media Crossways
Woodbury, New York 11797

Dear Mr. Dolan:

I am writing to object strongly to Cablevision's refusal to carry MSG Network cablecasts of Knicks, Rangers, and Yankees games on its Long Island systems. Speedy resolution of this situation will be in the best interests of Cablevision and MSG, the cable industry, and--most importantly--your subscribers.

Cable operators have the power and the freedom to program their channels in any manner that attracts subscribers. However, that power also begets a responsibility to those subscribers. Cable system operators should--indeed must--acknowledge and respond to their subscribers' desire to see the games of their local professional sports teams. Completely depriving access to popular professional sports programming does not serve the interests of the 500,000 Cablevision subscribers in the New York/Long Island area, for these fans have no alternative to a Cablevision system to see these games.

Also, continuing this dispute is not in the best interests of your industry. Cable has worked long and hard to bring distinctive and desirable programming alternatives to the Nation's television viewers. Cable's popularity has been due to its ability to serve the interests of a wide variety of subscribers, including sports fans. Congress and the Federal Communications Commission (FCC) have long recognized the importance of making local sports programming widely available through, for example, measures governing the conduct of broadcast TV networks and banning blackouts of sold-out major league games. Sports programming is more available than ever, and likely is a major reason for subscribing to cable. The importance of making available local major league sports programming to the public should not be minimized by the cable industry.

When Congress passed the 1984 Cable Act, it believed that keeping cable television regulation to a minimum would best benefit the public by enhancing the industry's ability to provide a cornucopia of programming services. The cable industry's success since that time has been phenomenal. It would be tragic if disputes like that between Cablevision and MSG forced Congress to contemplate whether additional regulation may be necessary to prevent their occurrence.

I urge Cablevision and MSG to begin new negotiations for carriage of the MSG Network on its New York systems as soon as possible. Don't shortchange the legions of Long Island sports fans who subscribe to Cablevision by refusing to show the programming they demand--the games of their Yankees, Knicks, and Rangers. The cable subscriber's interest is in having the greatest programming choice--not in having that choice made for him.

Sincerely,

/s/

Norman F. Lent
Ranking Republican Member
Committee on Energy and Commerce

cc: James P. Mooney
President
National Cable Television
Association

Hon. Edward J. Markey
Chairman
Subcommittee on Telecommunications
and Finance
U.S. House of Representatives

Congress of the United States
House of Representatives
Washington, D.C. 20515

JOHN BRYANT
5TH DISTRICT TEXAS

COMMITTEE ON
ENERGY AND COMMERCE
COMMITTEE ON
THE JUDICIARY
COMMITTEE ON
VETERANS' AFFAIRS

September 20, 1988

Honorable Edward Markey, Chairman
Subcommittee on Telecommunications and Finance
H2 - 316 House Annex 2
Washington, D. C. 20515

Dear Mr. Chairman:

Earlier this year, as a result of your able leadership, the Subcommittee held oversight hearings on the Cable Communications Policy Act. A number of important public policy issues which the 1984 Act sought to address were reviewed by the witnesses and Committee members. As we well know, the Act expresses the fundamental Congressional concern that cable systems be "responsive to the needs and interests of the local community" and that "competition in cable communications" must be promoted.

We heard testimony that cast some doubt on whether these vital telecommunications policy objectives were actually being met in the marketplace. I have come away from my discussions with local broadcasters very concerned that their stations have access to the viewing public over cable. My interest in 'must-carry' is nothing new.

I am writing to bring an example of yet another disturbing situation which has had a negative impact on cable consumers. This time it involves the showing of popular sporting events over the Cablevision system in the New York metropolitan area.

I have enclosed a series of articles which detail the total lack of responsiveness to "the needs and interests of the local community" on the part of Cablevision. These news articles and commentaries, in my opinion, again underscore the need for continued careful Congressional reexamination of the unbridled local monopoly power of cable systems. When that monopoly power is enhanced by an MSO's 'vertical' ownership of its own programming service, as it is in the case of Cablevision, true "competition in cable Communications" simply cannot flourish.

In a nutshell, it seems that Cablevision - which serves 600,000 subscribers in the tri-state New York area - terminated the Madison Square Garden network sports program when their contract expired and renewal talks reached an impasse. The crux of the contract dispute was MSG Network's interest in being moved to a basic service from a premium service.

WASHINGTON OFFICE: 412 CANNON HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515 (202) 225-2231
HOME OFFICE: 8035 EAST R.L. THORNTON, DALLAS, TEXAS 75228 (214) 767-6554

This indeed makes some sense since Cablevision is only paying MSG Network the basic rate per viewer for the programming - not a premium rate - even though Cablevision charges subscribers a premium rate per month for this sports channel.

Under these circumstances, the cable viewer is at the absolute mercy of the only cable operator with whom he or she can subscribe. A viewer's favorite program may not only be substantially curtailed, it could be eliminated completely, due to the operator's autocratic power to dictate what programs are carried. Cablevison's actions with respect to the popular MSG network clearly demonstrate that it is one cable system which has no problem exercising its raw monopoly power.

While I myself must express a home-court preference for the Dallas Mavericks, I do believe that it is inexcusable for tens of thousands of New York area cable subscribers to be forced to go without seeing the Knicks play. It seems to me that, in exercising its monopoly power, Cablevision is ignoring the consumer interest, hence "community" needs.

Should such marketplace abuses continue, I would give serious consideration to legislation in the next Congress to rectify them. Maybe it is time to expand the notion of 'must-carry' to include more open access to cable systems or more effective means of competition.

Sincerely,

John

JOHN BRYANT
Member of Congress

JB:bc
enclosures

Congress of the United States
House of Representatives
Washington, DC 20515

September 16, 1988

Mr. Charles Dolan
Cablevision
One Media Crossways
Woodbury, NY 11797

Dear Mr. Dolan:

We are writing on behalf of hundreds of thousands of our constituents who are also Cablevision subscribers in the New York-New Jersey Metropolitan area. Over the last two weeks, we have received numerous complaints concerning the ongoing dispute between Cablevision and Madison Square Garden Network, one of the major sources of sports programming in the districts we represent.

While the issues between MSG and Cablevision would ordinarily be characterized as a private matter between corporations, the fact that they involve a widely utilized broadcasting service presents a clear public interest. We are certain that you recognize the political and editorial pressure for closer federal scrutiny of the cable television industry. This matter is not confined to the New York-New Jersey market as conflicts in other regions of the nation have also provoked a public outcry directed at cable television firms.

The Cable Communications Policy Act of 1984, created a rather restrained federal regulatory scheme that actually protects the industry in many respects. That policy will be very difficult to maintain with the growing public perception that cable companies are able to monopolize a major source of home entertainment. Anything you can do to change that perception would benefit innumerable consumers and reduce demands for more intrusive federal regulation.

Thank you very much for your consideration.

Sincerely,

Ray McGrath

Frank J. Guarini, M.C.
Raymond J. McGrath, M.C.

Norman F. Lent, M.C.
Thomas J. Downey, M.C.

Robert J. Mrazek

Robert J. Mrazek, M.C.

New York Post APR 3 1989

CABLE FIRMS' LIES SIMPLY HAIR-RAISING

YOU'VE seen that TV ad for the hair replacement company. A man appears and says, "I wouldn't lie to you for a very good reason — I'm the president of the company!" No matter how many times you see the commercial, you say the same thing to yourself, "Whoa, Mack. You wouldn't lie to me because you're the president of the company? Gee, I can't think of a better reason for lying."

EQUAL TIME

PHIL MUSHNICK

The ad reminds us of cable operators, except that cable operators would remove your hair without your permission, claim it's for your own good, then bill you monthly for a basic package of things you no longer need or never needed, like a comb, brush, hair-dryer, rollers and a tub of Dippity-Do. And if you want your hair back, you can buy the hair replacement package for twice the cost of the basic package, but you must still buy the basic package, and have a nice day.

Ahh, cable. Cable operators wouldn't lie to us, it's just that more than two years ago, when the word got out that George Steinbrenner held a buyout clause from SportsChannel and that MSG might make a play, operators spread the word — "If MSG wins the Yanks, MSG must be removed from basic and become an additional-pay channel, just like SC. Otherwise, we'll face financial ruin!"

That was the story until last month, when a funny thing happened. TCI and its affiliated systems (TKR, UA Columbia and Heritage) broke ranks and signed on MSG's Yankeecasts as part of basic. Then CTEC, Harron and Vision followed suit.

This week, three more operators, representing more than half a million homes in New Jersey — Suburban Cable, ComcastStorer and Sammons — will announce they'll carry *all* MSG programming as part of basic. Furthermore, Sutton systems of N.J., including Monmouth Cable, is close to a deal with MSG.

Thus, the area's only major holdouts — those blacking out MSG's Yankeecasts — are Brooklyn-Queens Cable, ATC Systems (Manhattan Cable/Paragon/American CableQueens) and Cablevision, which seven months ago unplugged MSG altogether.

They wouldn't lie to you for a very good reason — they own the monopolies!

■

DAILY NEWS

APR [illegible]

Sunday, April 2, 1989

Cable greed has Yank fans in dark

TV SPORTS

BOB RAISSMAN

ARE YOU you angry today? You should be. We bet that a bunch of fans turned on the TV yesterday expecting to see the Mets play the Yankees and saw nothing. Zippo.

Yes, maybe your local cable gonif tried explaining it away with a notice blaming the MSG Network for depriving you of the game.

That's total baloney. Pure and simple. The blame rests with the entire regulated cable industry, a group made up of monopolists who gained their franchises — franchises that were acquired with promises to serve the public's best interests — by sleazing up to politicians eager to cut deals that were in *their* best interests.

Check out the rationale the cable crooks offer for not putting the Yankees on basic. They twist things, trying to prove they are looking out for your interests. "Why should all our subscribers have to subsidize viewers who want to see Yankee games," they say. "Just because MSG paid $500 million to buy Yankee TV rights, we don't have to do it the Garden's way. Why didn't MSG consult with us?"

Well, call your local monopolist and ask why *you* have to subsidize MTV, VH-1, The Weather Channel, and the assorted Home Shopping Networks that are part of basic. Tell them you don't watch them and don't want to pay for them. Watch them try to weasel out of that one.

And the business of saying that MSG should've consulted with cable operators before laying $500 million on Steinbrenner is bogus. If you are trying to bring the best properties to your network, if you are trying to enhance the product, you shouldn't be punished. It can only happen in the world of cable.

If there was *true* competition in the business, there would be a number of cable operators in Queens, Brooklyn, Manhattan and the Bronx, all vying to buy the best programming possible.

If true competition existed, do you think it would be hard for MSG to sell a Yankee package on basic? Of course it wouldn't. Operators would compete to get the programming rather than try to purchase it under their own terms.

Another fact has become clear. While companies like BQ Cable, Manhattan Cable, Paragon (all part of the new Time Inc./Warner cable monopoly) and Cablevision whine about the evils of making all their subscribers pay to put the Yankees on basic, other systems — mostly in New Jersey — have accepted MSG's terms.

What are those terms? According to industry sources, MSG has signed five-year deals with these systems. The average increase on basic on those deals is about 12 cents per year per subscriber, or a total of 60 cents per subscriber over the 5-year period.

Operators who want to move the Yanks to pay would likely charge anywhere from $1 on up per month for the games.

But the cable monopolists' position isn't based solely on money. Yes, they are worried about a cash-flow crunch because of subscribers who might exit SportsChannel in favor of a basic Yankee package. But there is another concern —corporate ego.

It doesn't take a genius to figure that MSG cut a very attractive deal with TCI, the first cable system to purchase a Yank basic package. It wouldn't surprise me in the least that as part of that deal, TCI boss John Malone made sure that in return for being the first system to sign with MSG, he got some kind of guarantee that no other system would get a better deal.

If my assumption is correct, you can bet that a company like Time Inc./Warner doesn't want to sign a deal that is not as good as Malone's. Guys like Jack Gault, who runs American Television & Communications (the Time Inc./Warner company that owns Manhattan Cable, American Cablevision of Queens and half of Paragon) don't like to be aced out by the competition. Neither do Gault's bosses, who are likely calling the shots now.

So you, the fan who enjoys kicking back and watching the Yankees, are victim not only of greed, but of ego. Let's face it, these same empty suits who say they're looking out for the greater good of all their subscribers don't have to worry about seeing Yankee games. When they're not droiding out with a martini in the Hamptons, they can always find a spare luxury suite at Yankee Stadium.

The fan who depends on TV to see Yankee baseball, does not have that luxury. These cable crooks are stealing a summer from Yankee fans. They, or any politician who doesn't have the nerve to come out and say they unequivocally support re-regulating cable, are nothing more then well-paid con men without a conscious.

What can you do? You can disconnect from cable, hit them in the pocketbook, where it hurts. If you don't want to do that, you can be a pest. Call your cable company over and over again and complain. Call your local, state and federal representatives. Your calls might not provoke any action but you must let them know they can't wear you out. Let them know it's impossible to beat you down.

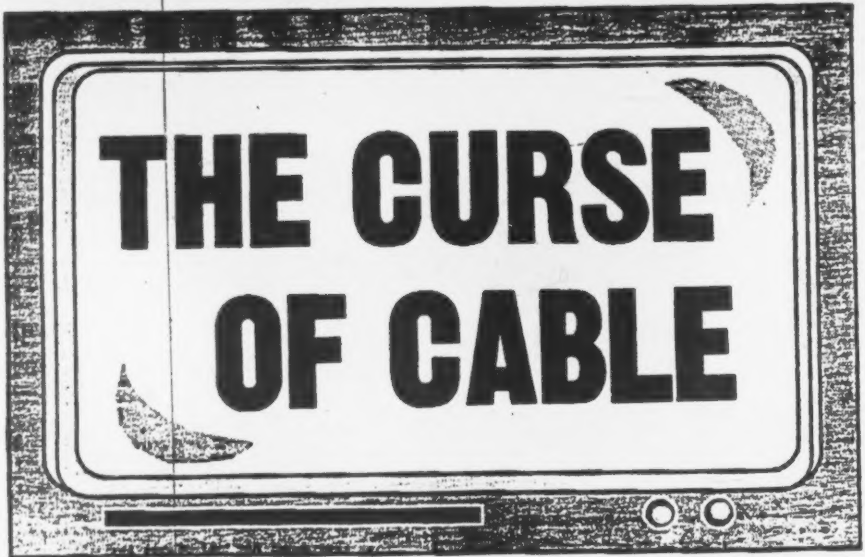
THERE'S ONE gratifying thing coming out of this sleazy situation. Since Cablevision boss Charles (Man From Monopoly) Dolan took the Knicks and Rangers off his systems, there's been a high-beam spotlight put on the cable industry. Fans have become informed and gotten involved. Politicians who have cozy relationships with cable companies have been exposed.

The burner will be turned up on these slimeballs if this situation isn't resolved. If you keep the pressure on, a skirmish over baseball could lead to a breakup of these cable monopolies. Re-regulation will come. The cable crooks will become victims of their own greed.

New York Post MAR 31 1989

EQUAL TIME

BY PHIL MUSHNIC



THE CURSE OF CABLE

A funny thing happened on the way to the future. About five years ago, in the spirt of free enterprise, the U.S. government gave the cable-TV industry the green light to do just about anything it wanted. For starters, the cable industry was told it could dictate to Americans what they watch on TV and how much they must pay to watch.

The government also told the cable industry that it could control vast territories, free from competition. "Excuse me," said one of the cable industrialists, "Would it be all right if we owned both the cable systems and the cable programming?" "Hmmm, we don't see why not," replied the government.

Well, the cable industry hit the streets of Washington, D.C. that day and exchanged the most enthusiastic high-fives ever seen by men in three-piece suits. The government had just granted cable operators a license to steal. And since many of these operators got their franchises via back-room political deals, they didn't need any refresher courses.

That was the day the cable industry was deregulated, and the price gouging, the disinformation campaigns, the conflicted interests and the general disregard for subscribers has been on the grow ever since. Now look where we're at. As we enter a month that should be brimming with delightful anticipation of Knick and Ranger playoff games and the opening of the baseball season, we're at the mercy of omnipotent, politically connected, government-protected cable operators.

Just look where we're at. The baseball season, the hockey and basketball playoff seasons will begin with a metropolitan area viewing audience that's thoroughly fractionalized.

As of this moment, there are five kinds of sports fans:

1) The fan who doesn't have access to cable, thus no access to most Knick and Ranger playoff games and only half of local Met and Yankee telecasts.

2) The fan who has access to cable, but can't afford cable. If you want the sports you love, you're talkin' about $550 per year —provided your cable company chooses to carry the sports you love. In other words, you've gotta be lucky just to have the chance to spend the money you can't afford.

3) Fans whose systems have unplugged MSG altogether (most tri-state area Cablevision systems). No Yanks, Rangers, Knicks or any other MSG programming.

4) Fans whose systems provide all MSG programming, including the Yanks, on basic cable — only about 30 percent of the Metropolitan area's cable homes. These systems include TCI, TKR, UA, Vision, CTEC and Harron.

5) Fans whose systems provide MSG's Knick and Ranger games, but not MSG's 75 Yankee games.

Now let's take a look at New York and New Jersey, and the biggest cable operator in each state.:

● New York, Cablevision — As you well know by

New York Post MAR 31 1989

now, Cablevision systems pulled the plug on MSG last Sept. 14. Cablevision never tires of its explanation — MSG's too expensive to be seen on basic and it's unfair for non-sports fans to pay for sports (although when Cablevision-owned SportsChannel-America bought NHL rights for $80 million, the money was provided by *all* Cablevision subscribers). Sports, Cablevision insists, is special-interest programming that belongs as a premium (additional pay) service.

Fine. Now let's go to last Friday's Ft. Lauderdale *Sun-Sentinel*, which contained a story about how Cablevision-owned SportsChannel is being shut out of appearing on Continental Cable systems, which have more than 120,000 subscribers in southern Florida's Broward County.

The story reads — are you ready for this? — "The sticking point is the same as it ever was. Continental wants SportsChannel as a pay service, while SportsChannel insists on being available on Continental's basic cable package."

Read it again — in Florida, Cablevision-owned SportsChannel, "insists on being available on Continental's basic cable package."

The story goes on to quote SC and Continental executives, each defending their company's position. And *everything* Cablevision/SC claims here is the exact opposite of what it's hollering about in Florida! Funny, in Florida, Continental claims that SC is too expensive for basic. Sound familiar?

The big difference is that in Florida, Cablevision owns only the programming (SportsChannel), whereas here it owns both the programming and the cable systems. Here, Cablevision dictates terms, plays the bully. In Florida, Cablevision screams that those very same terms are wildly unfair!

It's hideous, insidious, a horror show. Yet, politicians on Long Island, Cablevision's stronghold, have not made Cablevision accountable for a campaign of disinformation — for telling flat-out lies about a major consumer issue that has for seven months has deprived viewers of their most cherished form of TV entertainment. Cablevision's unyielding philosophy here does a 180 turn to suit its needs elsewhere and the message is clear — Cablevision can, and is, getting away with this.

● New Jersey's largest cable operator, Suburban Cable, serves 230,000 subscribers. Suburban says it will not provide MSG's 75 Yankeecasts unless MSG agrees to become an additional pay service. Suburban claims that the addition of the Yanks on MSG makes MSG too expensive (about 30 cents more per month per subscriber) to remain on basic. However, like Cablevision, Suburban does not plan to decrease the monthly cost of SC now that SC has lost the Yankees. Clearly, Suburban wants it both ways — it wants to charge subscribers more for MSG's addition of the Yanks, but no less for SC after its loss of the Yanks. How's that for a company that's promoting its position in this dispute as cost sensitive on behalf of subscribers?

Like Cablevision, Suburban claims it's unfair for all subscribers to pay for MSG on basic because sports represents a small, special-interest audience. Suburban claimed to New Jersey's largest newspaper, *The Star-Ledger*, that only five percent of its customers are interested in Yankee games. The newspaper dutifully printed that figure unchallenged; threw it out there as a fact.

Five percent? Only one household in every 20 suburban cable homes contains a person who's interested in Yankee games? Nonsense.

Consider the primary reasons people subscribe to cable — movies and sports. Thus, the sense of bait-and-switch is inescapable. You've got to buy basic in order to get through to the premium programming you really want. Consider, too, an A.C. Nielsen survey of the Metropolitan area that showed 45 percent of cable households to be interested in Yankee games. Other than presenting Suburban's five percent claim, *The Star Ledger* has been virtually silent on cable TV as a consumer issue. *The Star-Ledger* is part of the Newhouse chain. Newhouse also owns New-Channels, a multiple cable-TV systems operator. Hmmm.

This can't possibly be what the federal government envisioned when it deregulated the cable industry in 1984. Worse still, is that many elected and appointed officials are being deluged with consumer complaints, but these officials are not moved to take decisive action.

So stop wasting time asking your elected politicians how they feel about cable. Instead, demand to know what they're doing about it. Remind them that cable has become a 51-percent issue, and it would be a shame if, after the next election, they were to end up on the side that has 49 percent.

'Cable Fools' Day'

While politicians on Long Island have been pathetically slow to respond to the complaints of Cablevision subscribers who have lost MSG programming (Knicks, Rangers, Yankees), the bonding of a grass roots, nonpartisan group of L.I. sports fans continues.

Tomorrow, when the Mets play the Yanks on MSG, Cablevision subscribers *will* be able to see the game — provided they don't mind watching from a parking lot. Barry and Lawrence Altman of Cabletech Systems, Inc., in Carle Place, will donate the use of its parking lot, provide some snacks, set up some large TV screens and bring in the game via satellite.

"We're calling it 'Cable Fools' Day,' " said cable activist Henry Schaefer. "And we're gonna have some fun, beginning at 1 p.m." Cabletech Systems are at 207 Old Country Rd., opposite Roosevelt Field.

— *Phil Mushnick*

NEW YORK POST NOV 1

GOV. CUOMO MUST ACT ON CABLE FIASCO

An open letter to Governor Mario Cuomo.

EQUAL TIME
PHIL MUSHNICK

DEAR Governor Cuomo:

By now, it's clear that your office is aware of the issues that have prevented many subscribers from viewing Knick and Ranger games on most of Cablevision's downstate systems. Despite his admission that he lacks the authority to arbitrate a settlement, Richard Kessel, executive director of the state's consumer board, has been working diligently to exact a resolution.

But Kessel's a longshot to succeed, and problems, such as the MSG-Cablevision dispute, are in no way in decline. Quite the contrary. Perhaps you're unaware of another problem now besetting sports fans in another part of the state.

Upstate cable subscribers were shut out of Yankee telecasts on Cablevision-owned SportsChannel *for four months* last year because of a dispute between the cable network and the Yankees. A similar dispute this year deprived upstaters of SC's Yankee cablecasts for *two months*. Now, the system serving Troy, N.Y. (NewChannels), citing unreasonable money demands by SC, has dropped SC *completely*. No Yankees, Mets, Devils, Islanders, Nets.

One monopoly in a shootout with another monopoly and the consumer is caught in the crossfire.

The federal government granted the cable industry the right to operate the way it sees fit. Clearly, the cable industry has abused that privilege to the point where the interests of consumers are being ignored every minute of every day. It's time for America's elected officials, at every level, to stop counting the Political Action Committee (PAC) money the cable industry bestows upon them, and start winning back the entertainment rights of those they've been entrusted to serve.

Governor Cuomo, why not start by putting in a call to Cablevision boss Charles Dolan. Try this question on him: Why is it that bankers and corporations fall all over themselves to extend him credit, yet everywhere he goes he leaves a trail of disgusted consumers who have no recourse, save doing without cable?

Does it strike you as strange, Mr. Governor, that companies withholding much-wanted goods from consumers, are still able to flourish? Does the State of New York consider it legal that Cablevision has dropped MSG Network and therefore no longer pays rights fees for MSG, yet Cablevision has not decreased its monthly bill to consumers by even a penny? Where do you stand on this, sir?

In short time, Mr. Governor, you'll see that the cable industry's ways and means are those of an oppressive monopoly — a monopoly whose conflicted interests grow every day. These monopolies were granted by the government.

On the subject of conflicted interests, cable TV is a far greater consumer issue than the news media has reflected. NewChannels, for example, is owned by the Newhouse newspaper chain. The Knight-Ridder chain also owns cable systems. Time, Inc., *The Washington Post*, *The Los Angeles Times* and *The New York Times* all have millions invested in cable.

Furthermore, the major over-the-air TV networks are in a constant scramble to align themselves with large cable entities. Ted Turner's cable empire is owned in large part by cable systems, thus Turner's programming is cleared on these systems, while competing programming is shut out.

The cable business, head to toe, is fixed because the government granted it monopoly status. And the biggest losers are those who either pay the freight or do without cable — the little people, the consumers.

It's growing worse, Governor, not better. Sir, the time is long overdue to begin winning back the most basic of rights for the consumer — the right of choice, and at fair market price.

And if that fight begins tomorrow, it begins another day later than it should.

■

"TRADITION On *Ice*," a just-released, video cassette history of the Rangers from MSG Home Video, is, naturally, a must for Ranger fans. Lots of old black-and-white footage, a good feel for the old Garden, sit-down rap sessions with the old and current, a smooth one-hour production. And at $24.95, cheap (1-800-453-5000 to order).

While the video tasted great, we found it less filling. "Tradition On Ice" was lacking one key element — a sense of the traditional characters who turned Ranger fans on (and off) beyond the Ratelles, Bathgates and Patricks. The video's steady focus was on a couple of figures from each era. Perhaps a roll-call of some of the nostalgic supporting casts, with a few seconds of footage, might've served to wrap up each 10-year period.

From the '60s, we were hoping to catch a few seconds worth of Reggie Fleming bleeding, Earl In-

FINANCIAL WORLD

OCTOBER 18, 1988

OCT 3 1988

MARKET WATCH BY STEPHEN TAUB

The Price of Greed

The cable industry sure is getting cocky. Since deregulation, operators have been raising subscriber fees and offering prices for each others' systems quicker than you can spin the dial with your remote control.

But, now there are signs they are about to kill the goose that laid the golden subscriber. For this blame Cablevision Systems' Chairman Charles Dolan, the founder of HBO and launcher and buyer of numerous regional sports channels. Dolan's merchandising genius lies in offering varied packages of options, which leave subscribers paying for more channels than they really want. It's a sales trick increasingly used by the auto industry to peddle its options.

Dolan is embroiled in what might look to be a local spat with Gulf & Western's Madison Square Garden sports network. He wants to charge his Long Island, N.Y., subscribers $12 a month for MSG, which most everywhere else is offered as part of a basic package and costs Dolan only $1 per subscriber, or about what all Cablevision's other basic services combined cost him. MSG has cut the service.

It just so happens, Dolan owns a competing sports service whose rights to New York Yankees games expire shortly. Yankee owner George Steinbrenner says he may move the Yanks to MSG.

By keeping MSG off basic cable, Dolan has effectively reduced MSG's audience. Forget for the moment the hardship all this is causing fans and subscribers. Look instead at this blatant conflict of interest and how this spat could escalate into a national debate over cable deregulation. All that deregulation has achieved so far is to let existing monopolies charge higher fees. At least with airline deregulation, there was a flurry of fare cutting and a 50% rise in industry-wide employment. James Quello, the senior commissioner of the FCC—14½ years in office—initially voted for deregulation but seemed disgusted at how it turned out when he told us last fall: "The cable industry comes close to being an unregulated monopoly, even though it doesn't like being called that."

This may change. The FCC says it is seriously considering letting the regional telephone companies compete.

Meanwhile, Rep. John Dingell (D-Mich.), chairman of the committee that oversees the industry, keeps hinting he may reopen the deregulation issue in the next session of Congress, following widespread complaints of large, rapid price increases and poor customer service. He has warned: "[The cable industry is] in an extremely vulnerable position on the Hill. . . .Cable subscribers are aggrieved and feel that they have no alternatives."

Stay tuned.

New York Post SEP 14 1988

CABLE'S GRIP CHOKES PUBLIC

DON'T scratch your head and wonder why. Here's why:

Stockbrokers and investment counselors will tell you that cable TV is where it's at. Looking for, oh, a 3-to-1 return on your money? Invest in cable — specifically multiple systems operators (MSOs), companies that control a bunch of local cable systems. Why are cable systems good investments? Is it because they've earned the public's trust via good service, reasonable rates and attentive programming?

EQUAL TIME
PHIL
MUSHNICK

Hah! MSOs are good investments because government at every level has granted them a license to steal. Wouldn't you advise an investor to buy a piece of a company that has no competition within its territories? Wouldn't you advise your client to back an industry that operates virtually free from restraints while the public can't live without the product the industry controls?

Take the case of Turner Network Television (TNT), a new, national cable network scheduled to debut next month and hungry for a Major League Baseball package. With a snap of two fingers, TNT is being cleared for carry on cable systems throughout the country.

Why are systems eager to carry TNT? Easy. They're part owners of TNT. The fix is in. The whole thing is rigged. It's a tank job. And it isn't illegal, so it must be legal.

TNT is backed in large part by none other than TCI, the nation's largest cable systems operator.

Another big investor in TNT is ATC, another gigantic, national cable systems operator. ATC is owned by Time, Inc., which also owns HBO and Cinemax. So you know that HBO, Cinemax and TNT have no problem appearing on ATC's systems, while competing networks with similar goods might not be as welcomed.

Yet another investor in Turner TV is NewChannels, another large MSO. NewChannels is owned by Newhouse Publishing. You think the managing editor of a Newhouse newspaper is going to launch a three-part, Page 1 series on how cable subscribers are hostages of Newhouse's conflicted cable interests?

TKR, with two shamelessly inept systems in this area, is co-owned by Knight-Ridder publishing and No. 1 MSO, TCI. So how loud are Knight-Ridder's publications going to about for the end of the cable monopoly? They're part of it.

You think a TCI, an ATC, or a NewChannels is going to invest in TNT, then keep TNT off its systems? It's all rigged. And when you send in your monthly check to the cable system, you feed the fix. With every breath, MSOs grow bigger, stronger, more ruthless. Why not? The government, at every level, has placed its hands over its eyes.

Cable systems are not folding. They're not losing money. Their mark-ups on programming purchases are 100 percent. Systems that a few years ago sold for about $1300 per subscriber now go for nearly double. A system with 100,000 subscribers is worth roughly $250 million.

Which brings us to tomorrow, 7 p.m., when this area's largest MSO, Cablevision (another Turner TV investor) will unplug the Madison Square Garden Network. MSG wants to appear on Cablevision's systems as it appears on other area systems — as part of the basic package. Cablevision wants MSG to become an additional pay service, like SportsChannel. Thus, no contract between Cablevision and MSG, thus no Knick and Ranger cablecasts on this area's most plentiful systems.

But if Cablevision did not own SportsChannel, and if Cablevision had competition in its territories, MSG would not only appear on Cablevision's systems as a basic, it would appear at the lowest possible mark-up.

But what's happening isn't illegal. It's business. And business is business. So keep on paying your cable bill, and the cable companies will keep on fixing the game in their favor, not yours.

■

Congress May Have to Settle Cable Feud

When the current fight between Cablevision and Madison Square Garden Network broke out into the open, Charles Dolan, president of Cablevision, accused Madison Square Garden of trying to whip up the public against Cablevision as the villain of the dispute.

"We will not bow to that pressure," Dolan said. "If there are protestes outside our offices, we'll count them and then count the number of our subscribers who aren't protesting." The calls and letters and verbal protests have been coming in to Cablevision, to newspapers, to consumer protection bodies, but there has been absolutely no movement between Cablevision and MSG TV since the dispute broke out publicly Aug. 16.

TV SPORTS

Stan Isaacs

It appears there will be no settlement by the Sept. 14 deadline at which time the MSG TV contract with Cablevision runs out. Knicks and Rangers games, the prime attraction on MSG TV, will not be seen by Cablevision subscribers as long as the dispute continues.

Though Cablevision is seen as the villain in most of the complaints received, Dolan can point to the number of subscribers who don't complain as a majority. It is possible, though, that the dispute eventually will reverberate and bring some kind of congressional regulation back to the industry.

That spectre was raised this week by Richard Kessel, executive director of the state Consumer Protection Board.

"I am very concerned about this dispute," Kessel said. "I think Madison Square Garden programming — the Knicks and Rangers — is crucial to viewers. It's one of the reasons I have it.

"I think Cablevision should recognize that what counts most is not its differences with MSG but what its responsibility is to its customers. Dolan has built up tremendous goodwill on Long Island, particularly with his local news programming on Channel 12, so I hate to see him spoil it with something like this. I hope to talk to him and the Garden. I hope Dolan will listen to reason."

Kessel admitted there is little that his agency or other government bodies and political figures can do because of the deregulation of cable. "I think it is the biggest consumer ripoff we have. There is nobody to control cable, so they can do as they please."

Kessel said, "It reawakens the need for Congress to regulate the industry. We can try to do something by verbal persuasion, but when it comes down to it, people's protests may be most effective if they write to their representatives in Congress."

Kessel's comments echoed an industry figure who said, "The irony of this Cablevision-MSG fight is that it may go beyond their dispute to bring Congress down on the whole industry."

A Cablevision representative admitted to receiving at least 400 complaints.

One upset subscriber, Dean Lastfogel of Woodbury, has circulated a letter to local advertisers asking for their support. Ben Orland of New Hyde Park wrote, "A provider of cable service, e.g. Cablevision, should *not* be permitted to own programming networks." Annette Dagosto of Elmont: "The fact that Cablevision is allowed to own SportsChannel is a flagrant conflict of interest."

The fight to gain the cable rights to Yankee games is at the heart of the dispute. MSG's desire to be on basic cable rather than be programmed as a pay channel by Cablevision is a bid for more revenue and viewers; that would put it in a better position to win the Yankee contract. Cablevisison/SportsChannel, which has the Yankees rights that expire at the end of this season, does not want to help the Garden's position with the Yankees.

A significant factor in all this is that MSG is a basic service in almost all cable systems but Cablevision; only Cablevision has made it a pay system and has frequently relegated it to a second-class status by not advertising Garden programming or by lumping it with SportsChannel programming. Another eyebrow raiser: Cablevision is selling SportsChannel America, its new service providing NHL programming, as a basic service.

The dispute has brought to the surface longtime subscriber complaints against Cablevision service and tardy phone responses. Its unilateral packaging of channels inspired one customer, Dennis Fingold of Plainview, to make this offer to Cablevision:

"Since you have the right to pick and choose which channels are an additional monthly charge, why not deduct 60 cents per month for each of the following stations that you give to me and which I have no desire to have: Christian Broadcasting Network, MTV; VH-1, Telicare, Lifetime, Arts & Entertainment, Nashville Network, Weather Channel and Discovery."

There are five days to the end of the Cablevision-MSG contract. As of yesterday, neither side said it had plans to contact the other to try to break the impasse. Some esteemed members of Congress may soon start paying attention.

New York Post AUG 24 1988

VIEWERS' CRUSADE

Cablevision subscribers must fight for their rights

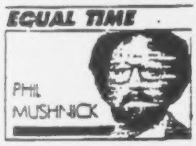
WHEN Knick and Ranger games are pulled from Cablevision's 14 area systems next month, thousands of subscribers have a golden chance to make history. They have a chance to be the nation's first sports fans to win back their wants and needs from the cable monopoly that has a stranglehold on their sports entertainment. They can show the nation how it's done.

After years of abuse, Cablevision subs now must stand and fight a company that's far more interested in undermining a competitor than providing viewers with the events they crave and deserve at fair market price.

Cablevision subs — and there are over half a million of them in the tri-state area — have a chance to dictate terms. But they must have the perseverance and conviction to declare a united front against Cablevision and not surrender until their needs supercede the insatiable profit lust of Cablevision. This situation screams for a boycott.

■

FIRST SOME BACKGROUND: As things now stand, Cablevision will pull the MSG Network from its systems Sept. 15. Thus, no Knick or Ranger games, nor any other MSG programming, including college baskets and football, boxing, horse racing, studio shows and sports specials. They pulled the same garbage in Boston, where Red Sox cablecasts were not offered on Cablevision's two systems because the telecast rights belonged to a competitor of SC-New England.



MSG appears as a basic channel — part of the basic monthly cable fee — on virtually all area systems except Cablevision's, which have pointedly and maliciously jerked MSG around for years. Cablevision has worked diligently to keep its subscribers in the dark about where and when to find MSG.

Indeed, for years Cablevision's viewer guides haven't even listed the existence of MSG, calling the channel it appears on "SportsChannel II," as if Knick and Ranger telecasts are the property of Cablevision-owned SC. Every other cable channel, except MSG, is properly identified by Cablevision. ■

WHY DO THESE CONDITIONS EXIST? Easy. MSG programming competes with SC/Cablevision programming. That would be no big deal, except that Cablevision also owns the systems through which SC is purchased and viewed. Thus, the most fundamental of conflicted interests. Cablevision wants its programming purchased on its systems, while competing programming can take a hike. It becomes a matter of what Cablevision wants you to have, not what you want to have.

And be assured that if Cablevision didn't own SC, it would have no quarrel with MSG. And be assured that if Cablevision had competition from another system in its territories, it would have no problem with MSG.

to be presented on Cablevision systems as it is on all other systems — as a basic channel that's part of the no-frills monthly charge. Cablevision refuses. Thus, Sept. 15 looms as the day MSG disappears from Cablevision's systems.

Cablevision's game plan is to portray MSG and its owner, Gulf+Western, as the big bad wolf. In reality, the ruthless giant is Cablevision, which charges the highest subscriber fees in the area while gobbling up smaller systems for hundreds of millions of dollars. Cablevision's owner, Chuck Dolan, is wealthier and more powerful than any five GW honchos combined. *Forbes Magazine* lists Dolan high on its 1987 list of the 400 wealthiest Americans, estimating his worth at $550 million. Dolan has made a fortune from his cable customers. Now he wants to show his appreciation by pulling Knick and Ranger games from his systems.

■

THE YANKEE DIMENSION: SC is in competition with MSG for Yankee rights next season. That Cablevision's ready to deny MSG to its customers can easily be interpreted as a ploy to enhance its bargaining position with the Yankees. And if Cablevision loses the Yankees, perhaps it does what it did with Red Sox games, and prevents Yankee cablecasts from appearing on its systems here.

SO WHAT TO DO: Understand that cable is a federally de-regulated industry. The government has told cable it can operate in a wild, wild West manner, thus the daily stickups. No one's inclined to help out the consumer — not the politicians, not the cable commissions and certainly not the cable systems.

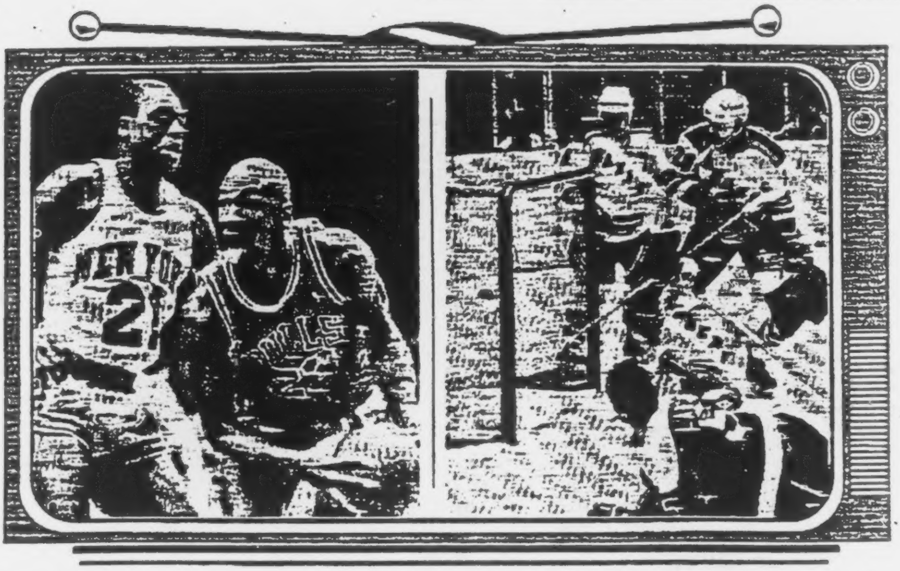
The only one who can help you is you. If you're a Cablevision victim, call your system, call it today (see accompanying box for phone numbers) and issue a loud warning that if MSG is pulled, you're gonna begin canceling all Cablevision-owned programming, which includes SC, Bravo, American Movie Classics and soon-to-debut SC-America. Additionally, cancel anything and everything you can live without, especially premium channels, like Cinemax, Showtime, Disney and HBO.

It's time to squeeze 'em back. If you currently pay Cablevision, say, $45 per month, do everything you can to bring your bill down $10-$15. Talk it up with your friends, get serious, follow through. Hit them smack in the profit margin — it's the only thing they understand, the only thing that'll make 'em blink.

It'll mean sacrifices — like maybe a month or two, or even an entire season without the Nets, Islanders and Devils on SC. Perhaps you may choose to wait until after the regular baseball season before pulling out of SC, but in order to win this, you must decrease your payments to Cablevision. Start today with a threatening phone call. Then, on Sept. 15, if MSG's yanked, call and start canceling. Tell them you'll buy the goods back when MSG reappears as a basic.

Get tough, dammit, or you'll continue to play the pawn in the monopoly. You have a shot to win this thing because they're playing with your money. But don't leave it up to your neighbor. You and your neighbor must act. If you don't, you'll have no one to blame but yourselves. If you play as boldly as Cablevision, you can win. You

New York Post AUG 24 1988



A TURNOFF: *If Cablevision follows through with its plans, the cable company's subscribers won't be able to tune in the Knicks and Rangers on MSG Network in the upcoming season.*

WHERE TO CALL FOR ACTION

The following is a list of the names and numbers of the Cablevision systems that plan to pull MSG off the air on Sept. 15:

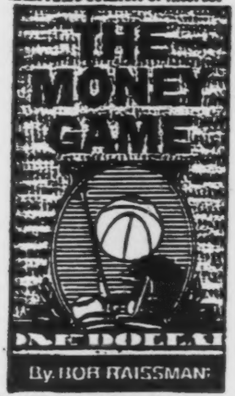
Long Island	516-496-1100
Connecticut	203-846-4700
Bayonnne	201-436-2500
Bridgeport	203-333-5883
Dutchess County	914-877-9454
Islip	516-666-2000
Lawrence/Lynbrook	516-887-9800
New Jersey	201-569-3720
Westchester	914-237-1600
Port Chester	914-937-0774
Yorktown/Bedford	914-962-4444
Easthampton	516-496-1100
Great Neck	516-829-6990
Huntington	516-271-8800

DAILY NEWS

AUG 22 1988

Sunday, August 21, 1988

Cable reigns without rules



CABLEVISION and the Madison Square Garden Network are locked in a battle for the big bucks. At this point, neither wants to disrupt its corporate strategy and engage in a compromise keeping Knick and Ranger games available to Cablevision systems' 800,000 viewers.

You're probably already used to being trashed by powers that be — whether it's franchise owners, networks, cable systems or player agents — who control sports. Just think back to the NFL replacement games and the people who *actually* paid to attend those games. The NFL, ABC, NBC and CBS knew they had a captive audience. They played you for fools. They weren't disappointed.

This Cablevision/MSG conflict is serious business. On the surface, the worst thing that happens — if no compromise is reached — is that Knick and Ranger fans wired to Cablevision are deprived of games. But the conflict has far more serious ramifications.

See, there's no way to control this situation because the cable TV business isn't regulated. It will come up again and again. We don't think Cablevision should be allowed to operate cable systems and provide programming to its own systems — in effect, dictating what you watch and buy — but they are within their rights. Why? Cable is a game with no rules.

Cable TV is a powerful force. Cable programmers, ~~such as MSG, are owned by~~ companies that own teams. Programmers, such as Prime Ticket in LA, help buy a star player — Wayne Gretzky — for a team they carry on their station.

It goes on. MSG and Cablevision's SportsChannel both want to buy Yankee TV rights. You have to be naive to believe to think that each one's position in their current dispute doesn't relate to their strategy for acquiring the Yankees. In cable, all these cozy relationships — some that raise conflict-of-interest and monopoly questions — are allowed to exist.

There's a groundswell in Washington calling for regulation of the cable buisness. We think federal legislators looking into all this should check what's going on here. Maybe it would give them cause to speed their action.

In the meantime, sit back, relax and get ready to be shafted again.

•

What does Audiotext have to do with sports?

Well, if you've been noticing, the telephone company has been offering these new "540" lines that you can call and get people handicapping a variety of sports. The phone company says there are about 12 handicapping lines here. The number is growing across the country.

Many of the lines are basically ads for expensive tout services. One we came across, the Sports Selector (540-2474), isn't. The guys providing the info are Michael (The Bird) Siegel and Larry Lothar. Siegel handicaps pro and college football, baseball, hockey and college basketball; Lothar, his partner, handles college hoops. Their service is priced at $3 for a two-minute call. They receive a percentage of each call.

"We know there's no such thing as a lock," Siegel said. "We give our previous day's record each day. Our record is an open book."

The duo has the service in other parts of the country, too. Lothar, at the beginning of last NBA season, picked the Lakers to repeat. "We each stick to our specialties. This is all we do. We're not trying to rope anyone into paying big bucks or giving us their credit-card numbers."

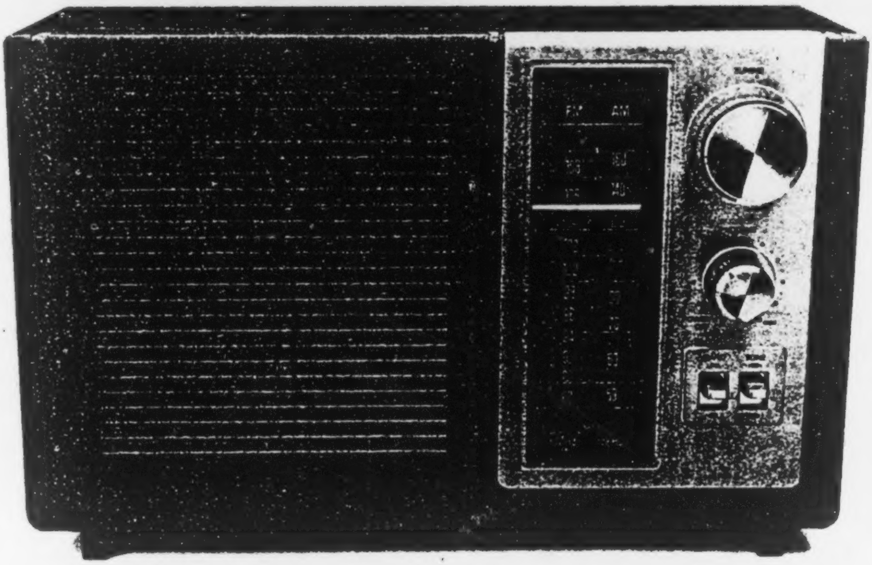
•

Back to cable. Sources report that CNBC, NBC's new cable operation, will offer a 40- to 50-week series of Saturday night fights in 1989. It looks like Dan Duva, who came to NBC offering cable exclusivity — something MSG Ar promoter Bob Arum, who handles ESPN's boxing cards, can't do — along with a consortium of four other promoters, will make the fights.

Attachment No. 6

Advertisement for Cable Telecast of Mets Game

IF YOU DON'T HAVE CABLE, ENJOY WATCHING THE METS GAME TONIGHT.



And the Yankees games. And the Islanders games. And many of the other New York area sports events aired exclusively on cable's SportsChannel.

You see, without cable you're missing out on a lot more than just great movies and music television. From baseball to Belmont, you'll find over 375 New York area sports events on SportsChannel this year alone.

What's more, for a limited time, we'll install your cable for only 88 cents.*

So, if you're a true New York sports fan, you owe it to yourself to get SportsChannel from Monmouth Cable. We offer everything. Except, of course, the hot dogs.

MONMOUTH CABLEVISION

Freehold & Wall 681-3507 · Asbury/Ocean Township 493-3800 · Ocean County 364-2555.

*Offer applies to standard installation in cable service areas only. Addressable converter and converter deposit may be required. Other restrictions may apply.

Attachment No. 7

Draft Bill

"Free Baseball Telecast Act of 1989"

A BILL

To condition the antitrust exemption for major league baseball teams and the compulsory copyright license for cable television systems upon the provision of a fair opportunity to local over-the-air broadcast stations to televise at least 50 percent of a team's televised games.

Be it enacted by the Senate and House of Representatives in Congress assembled,

SECTION 1. SHORT TITLE -

This Act may be cited as the "Free Baseball Telecast Act of 1989."

SECTION 2. LIMITATION ON MAJOR LEAGUE BASEBALL EXEMPTION FROM FEDERAL ANTITRUST STATUTES.

Notwithstanding any other provision of law, any major league baseball team which enters into or performs any contract that provides for the exclusive exhibition, during a one-year period ending November 15 of any year, of more than 50 percent of its televised games by one or more cable television systems or program services, shall be subject to the antitrust laws with respect to the conduct of such team occurring in the two-year period beginning on January 1 following such one-year period.

SECTION 3. LIMITATION ON CABLE TELEVISION COMPULSORY COPYRIGHT LICENSE

Notwithstanding any other provision of law, any cable television system (including all parties under common ownership or control) which enters into or performs any contract that provides for the exclusive exhibition, during a one-year period ending November 15 of any year, of more than 50 percent of the televised games of a major league baseball team by such cable television system or related entity, or any cable system which exhibits such games pursuant to an agreement with such an entity, shall not be entitled to a compulsory copyright license under Section 111(c) of Title 17, United States Code, for any cable television system under the entity's common control or ownership, and the provisions of such Section 111(c) shall not be applicable to such system(s).

SECTION 4. DEFINITIONS.

As used in this Act -

(1) the term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 relates to unfair methods of competition; and

(2) the term 'major league baseball team' means any member of the two major professional baseball leagues.

Senator METZENBAUM. Thank you very much.

Mr. Schmidt, president of the Wireless Cable Association.

STATEMENT OF ROBERT L. SCHMIDT

Mr. SCHMIDT. Thank you very much, Mr. Chairman, for the opportunity to be here today.

First of all, I want to state we are wholeheartedly behind the legislation that you have introduced. I want that on be on the record first of all. Second, without it being taken as a facetious comment, I was here for your hearing a year ago, and I noticed a different tenor in the presentation by the cable industry. I would also tell you that the programming issue, which is of primary concern to us, seems to take on a different light the closer we get to a hearing date. I would encourage you to have biweekly hearings in the future, because, again, I think it is pressure and the kind of pressure that you are bringing from the Congress that is taking its toll and bringing consumers a genuine opportunity for choice in programming.

I noted with interest Mr. Mooney's chart of programming services that are available to the wireless cable and to the home dish markets. I am going to make a call as soon as I leave here to one of my constituents, Mr. Theroux, because I noticed the chart suggests that he is under contract to receive Sports Channel of America, which I can tell you is misleading. So I will look at the rest of this list, but I am not sure that this, again, is good research on whether, again, we are getting the product that we are supposedly receiving from various programming sources.

Senator METZENBAUM. As I understand it, you are saying Mr. Mooney indicated that the people in Cleveland are getting the Sports Channel?

Mr. SCHMIDT. This document, which I think was submitted as part of his testimony, represents satellite programming purportedly under contract by MMDS systems and home satellite dish distributors. One of those companies listed here is Sports Channel of America, and it says here, "Sports Channel of America is carried by Metroten." Well, Sports Channel of America is the company that has denied Mr. Theroux's company the opportunity to have a contract to carry the Cavaliers games.

Senator METZENBAUM. My understanding of the situation is in accord with yours. I hope the cable industry's other representations do not contain other errors of a similar nature.

Mr. SCHMIDT. Again, I will follow up with some written clarifications of these things. I will not take the time right now to burden the committee.

I would just tell you that a year makes a difference. Since this industry appeared before the subcommittee a year ago, we have made strides in spite of what I think are considerable barriers to entry on the part of the big cable interests. I think it is important for this committee to understand some basic economics, not to take anything away from Dr. Ordover's testimony. There are three ways to generate revenue for a cable system. You either raise the rates, find more subscribers, or find a new service to add to then charge for that new service. Unfortunately, the cable industry, I think, has chosen to go with the first option—raising rates—as the sole approach.

I had the opportunity earlier this year to go down to Tennessee at the request of Senator Gore, and there were 220 citizens, including 20 mayors from small towns in western Tennessee, who had what I call the closest thing to a lynch mob in process as a result of a cable company raising its rates 50 percent. The problem is the public does not understand there really are options available. A number of people have suggested that the telephone industry is a solution. I am not concerned about whomever wants to come and compete. I think the point is we need to have two or more providers of the basic cable service, because cable is a local monopoly. In spite of what Mr. Mooney would suggest, there is a monopoly on basic cable. That is, if you want basic programming there is only one place you can buy it from.

Big cable has often suggested that this small industry whom I represent is both incapable of performing a distribution service, technically deficient, now secured from pirates, and our business practices are just not quite up to snuff. I want to show you what they fear [lifts MMDS antenna].

This is a piece of hardware which represents what the consumer would have on their home. This antenna device with a down converter will allow a consumer to receive 33 channels, coded, therefore secure, and addressable. This can be delivered today to a consumer for one-fourth the cost it takes to install a cable subscriber. We are prepared to bring this service to Americans throughout the country. This signal can be received up to 50 miles from the transmitter.

Now, yes, it is line-of-sight; yes, there are some physical limitation if you are located in the middle of a dense forest. But there are many people in this country who are second-class citizens from a television viewing standpoint today because they are not allowed to get programming unless they have cable. We can serve many of these people today.

Thank you very much.

[The prepared statement of Mr. Schmidt follows:]

TESTIMONY OF
ROBERT L. SCHMIDT
PRESIDENT, WIRELESS CABLE ASSOCIATION
BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

April 12, 1989

Mr. Chairman, Members of the Subcommittee, on behalf of the Wireless Cable Association, I thank you for the opportunity to testify at this important hearing. The wireless cable industry is grateful for every chance to discuss the state of the industry and to engage in a dialogue with its coaxial cable counterparts.

I would like to take this opportunity, Mr. Chairman, to commend you for your leadership on the issues affecting American consumers of subscription television services. I recall about this time last year reading suggestions in the trade press that your first hearing on this subject was only an election year phenomenon. But it is obvious to anyone who follows this industry that your interest is not only genuine, but that you have also been extremely diligent in building a record and calling your Senate colleagues' attention to business practices which have an impact on virtually every American household.

Over the last year you called a hearing, conducted a survey of programming practices, and corresponded with the Department of Justice on significant developments, most recently the Time-Warner merger. I know, too, that you have held countless meetings with cable executives, programmers, consumer groups, and entrepreneurs, including wireless cable operators.

I understand that you are now examining very closely the legislative options that may be available to you and that this hearing may help you decide the most appropriate route to take in order to assure that reasonably-priced subscription television services will be available to consumers. The Wireless Cable Association applauds your efforts.

Last year, Mr. Chairman, Jim Theroux, the president of Cleveland's MetroTEN Wireless Cable Company, testified before this Subcommittee. He also applauds your efforts and has asked me to request that his statement be submitted in the record, which with your permission I would like to do.

Today's Issues Are Business Issues

I am fully aware that this is the Senate Antitrust Subcommittee. At first blush, the members of this Subcommittee might believe that the subject before them today sounds very complicated and alien, given the references to complex technologies and very specialized communications law issues. But in reality the question before the Subcommittee today is very simple and is one which the Subcommittee has dealt with time and time again. The real question is whether adequate competition exists in the marketplace for subscription television services.

Today, largely as a result of the 1984 Cable Act and the FCC's implementation of that Act, we have at the local level what amounts to an unregulated monopoly. As you noted in your March 6 letter to the Justice Department concerning the Time-Warner merger, Mr. Chairman, there are over 8,000 communities which are fortunate enough to have been wired for cable, but in less than one percent (1%) of those communities do consumers have a choice of cable companies. Even the Wall Street Journal, which ordinarily is a champion of big business, recently observed in an editorial that cable's monopoly of local television services is "as outdated as a rabbit-ears antenna" (p. A22, April 4, 1989).

Despite Obstacles, Wireless Cable Grows

Much has happened in the year since the Subcommittee's first hearings on this issue. Let me tell you first how the wireless cable industry is faring. Although we continue to face very serious obstacles, I can tell you that wireless cable is alive and growing. Wireless cable operations are up and running in thirty different communities across the nation and, in virtually every other area of the country, it is potentially feasible for wireless cable operations to give consumers a choice in satellite programming. I am happy to report that there has been some progress in wireless cable operators' access to programming. For example, within the last year both The Discovery Channel and The Disney Channel have become available to wireless cable and are doing quite well with us.

Cable Industry Concentration is a Continuing Problem

Overall, however, the trends that you identified last year relating to consumer price increases, service problems, and competition in the industry have continued to accelerate. In particular, service problems relating to hardwire cable television delivery systems persist, the concentration of cable operations in the hands of a few multi-system operators ("MSOs") has increased, and vertical integration between programming services and the big cable distributors of those services is on the rise.

With respect to price increases, the GAO survey you commissioned, Mr. Chairman, showed an alarming rate of increase, 27% on average, in the State of Ohio. The citizens of Ohio are not alone in facing steep cable rate hikes: The Department of Labor found that in 1988 cable rates rose at a higher rate than any other service or commodity included in the Consumer Price Index. This trend appears to be continuing unabated in 1989.

Cable systems also appear to be operating with little regard for customer service in many areas of the country. Signal quality is often poor, and anyone who has phoned their cable company and been kept on "hold" -- if they were lucky enough to have their call answered in the first place -- knows that cable's response to service problems is casual at best.

This situation has led state legislatures, including those of California and New York, to consider enactment of a "Cable Subscribers' Bill of Rights" and other measures designed to improve cable service. (A copy of one such Bill of Rights is attached as Exhibit A.)

Regarding the accelerating trends of horizontal concentration and vertical integration, you are well aware, Mr. Chairman, I know, of the Time-Warner merger. Everyone knew this merger was a big train moving through the Justice Department, but we had no idea how fast a train it would turn out to be.

I am very impressed with the efficiency and thoroughness of the Justice Department and its ability to review, in a very short period of time, every serious issue raised about the merger. The Department was able to completely satisfy itself as to all aspects of this unprecedented, $20 billion deal inside of a month. I wish all of our government agencies could be so efficient. (See Wireless Cable Association testimony before House Judiciary Committee, attached as Exhibit B.)

Unfortunately, there is every indication that the industry will continue this pattern of consolidation. Most recently, I have read accounts of the proposed takeover of the Financial News Network by Turner Broadcasting System. We have not heard the last of this urge to merge.

A related trend which you, Mr. Chairman, have been monitoring for several years, at least since your hearings in the

100th Congress, is the migration of sports broadcasting to exclusive cable carriage arrangements. This issue will only increase in importance. I believe that we are not far from having regional sports programming networks for every area of the country. The carriage and exclusivity of this programming will determine fans' ability to see their favorite teams, as well as the price they pay.

Red Herrings Raised to Mask Anticompetitive Conduct

I realize that the Subcommittee has heard many explanations from cable and programmers concerning their business practices. It is my belief that these "explanations" are in reality thinly-veiled attempts to excuse anticompetitive practices. Let me focus for a moment on what the Members of the Subcommittee might have been hearing about the wireless cable industry.

I must tell you first that what you may have heard about wireless cable is really no different from what is said about anybody else who tries to get into business and compete with big cable. There is always an excuse or rationale to disguise what is really happening -- that programmers are coerced by their big cable partners and not permitted to sell to alternative distributors. The Subcommittee could hear the same story from representatives of the backyard dish (TVRO) industry, from satellite master antenna television (SMATV) or private cable operators, and from small and independent cable operators. Most recently, big cable has mounted an all-out campaign to keep telephone companies out of the cable business. The common factor in all of these cases is that every time somebody knocks on the door and tries to get into the marketplace and offer consumers a choice, cable will do everything in its power, which is quite enormous right now, to keep competitors out and maintain their stranglehold on the local markets.

With respect to wireless cable, you have probably heard that our technology is not reliable, that our signals are easily pirated and that we are just plain bad business people. Let me take a moment, and I have had to do this so often that perhaps I can do it briefly, to address each of these points.

1. Wireless Cable Technology is Reliable

The technology arguments raised by cable are completely unfounded, and may be quickly dismissed. Wireless cable transmits over the "Super High Frequencies" -- the band just above UHF and VHF -- to rooftop antennas, and then "wires" its signal into subscribers' homes. An independent study by the General Electric Company found that wireless cable meets or exceeds coaxial cable in fundamental performance areas like signal quality. As the 20,000 wireless cable subscribers in Cleveland could attest, there are no problems with our technology.

2. Wireless Cable is More Secure from Piracy Than the Average Coaxial Cable System

Cable has tried time and again to raise the red herring of signal security in its attempts to denigrate the wireless cable industry. As we have demonstrated repeatedly, there is no basis for this attack. Thanks to recent technological developments, today wireless cable transmissions are less susceptible to piracy than are conventional coaxial cable systems. For example, Cleveland's MetroTEN wireless cable operation uses the Zenith Z-TAC security system, a system which is superior to that used by many of the cable systems currently carrying HBO and other satellite television programming. Indeed, in his House Judiciary Committee testimony last month, Time, Inc. Chairman Dick Monroe stated that many millions of dollars were lost each year because of cable homes pirating HBO. The trade press reported recently that HBO insisted that the New York wireless cable operator employ the Z-TAC system. I can't conceive of a more eloquent testimonial to the security of our signal.

3. Wireless Cable Operators are Sound Businessmen

Finally, cable attempts to denigrate the wireless cable industry by questioning the financial integrity of wireless cable operators. The spuriousness of this charge is best illustrated by MetroTEN's experience in Cleveland.

As the Chairman well knows, Jim Theroux, a former cable television executive, has tried for over five years to obtain HBO for his MetroTEN wireless cable subscribers. He has offered every conceivable financial guarantee, including a full year advance payment for 10,000 subscribers and a substantial signing bonus. All of this was in addition to the fact that MetroTEN is backed by Boston's TA Associates, one of the largest and most respected venture capital firms in the United States. We are hopeful that at least MetroTEN's situation will finally change and that soon its Cleveland customers will be able to view HBO. I understand that just last Friday, April 7, HBO agreed in principle -- a contract has yet to be signed -- to sell to MetroTEN.

We believe that what motivates HBO and other programmers who refuse to deal with us is a fear of competition. As you noted in your letter to Assistant Attorney General Rule, Mr. Chairman, MSOs enjoy substantial leverage with programmers, if not outright control. Programmers' big cable partners realize that once competitors such as wireless cable are able to carry desired programming and compete head-to-head, cable will no longer enjoy its virtually unlimited ability to raise rates. Cable price increases are imperative because of big cable's dependence on increasing future cash flow to meet the $3,000 per subscriber and more that cable companies are now being purchased for. This is the real "financial" issue, not wireless cable operators' ability to pay their bills.

This is why big cable fights tooth and nail to prevent any beachhead in the marketplace by any delivery system in any area, whether or not the location is or ever will be wired for cable. By raising excessive barriers to entry, big cable is making many people, especially those living in rural communities, second class citizens.

As some of your other distinguished witnesses can tell you today far better than I, if a local market like so many of our rural areas is not wired for coaxial cable, then it is good business for programmers to use alternative delivery systems to reach these additional, otherwise unreachable customers. But big cable doesn't want that to happen.

Cable Overstates its Role in Creating Programming

Attacks on the integrity of the wireless cable industry are not the only excuses cable makes. Cable also attempts to justify its monopoly status by claims that it took the risks and created the programming now being denied wireless cable. Wireless cable, big cable asserts, should take its own risks and create its own programming. These assertions are as misleading as big cable's claims about the wireless cable technology.

Myth No. 1: Cable took a risk.

The cable industry's collective memory is evidently very short. I, for one, remember the "good old days" of the early-to-mid 70's, and cable's battle with broadcasters over the compulsory license. At that time, it was cable who argued that access to programming at reasonable rates was necessary to enable a fledgling industry to compete.

Cable prevailed in its argument and was granted a compulsory license which allowed it to carry certain broadcast programming for a very low rate. It was this advantage, more than anything else, that enabled cable to quickly consolidate its position in local markets and reap substantial profits. And these monopoly profits in turn have enabled the industry to buy existing programming services.

This was not risk-taking. Cable would not be in the position it enjoys today had it not been for the benefits it received early on from its compulsory license.

Myth No. 2: Wireless cable can create its own programming.

Television transmission technologies are, in a very real sense, creatures of FCC regulation. We all, cable included, owe our existence in some part to FCC rules. The first of the FCC decisions that made wireless cable possible as a commercial venture was not issued until late 1983, and it took several more years for the complete regulatory structure to be put in place.

By this time, cable -- whose regulatory fate had been decided much earlier -- had enjoyed nearly two decades of unparalleled growth, thanks in part to the compulsory license I just mentioned. During this period, when cable faced little or no competition in local markets because alternative commercial distribution systems such as wireless cable were not legally possible, the industry was able to use its monopoly profits to enter into exclusive arrangements for programming.

As a result, we face a situation today where there is only one major movie studio -- MCA/Universal -- that does not have an exclusive arrangement with a premium programming service. Time, Inc.'s HBO has exclusive deals with Cannon, Columbia/Tri-Star, Lorimar, MGM/UA, New World, Paramount, 20th Century Fox, and Warner Brothers. Viacom's Showtime has entered into exclusive arrangements with Disney/Touchstone and Orion.

Given HBO and Showtime's lock on these studios' best product, it is disingenuous at best for big cable to assert that wireless cable should launch its own movie channel. By a fortuitous set of regulatory circumstances, cable got a jump on competing technologies and was able to corner the market for movie product. For cable now to claim that the same opportunity is available to wireless cable and other competing technologies simply ignores the realities of the marketplace.

Myth No. 3: Wireless cable does not respect a businessman's prerogative to deal with whom he chooses.

Another myth circulated about wireless cable is that we are trying to force programmers to deal with us against their will. Nothing could be further from the truth.

The Wireless Cable Association strongly supports the longstanding principle that business people should be free to exercise their independent judgment about who they want to do business with. We believe, however, that the problem the Subcommittee is addressing today is that programmers are not free to choose, that they are instead coerced by their large, powerful cable partners into refusing to deal with alternative technologies.

This belief is based on elementary economics. It is in a programmer's economic interest to sell its product to as many outlets as possible. If programmers are acting inconsistently with this basic economic truth, other, anti-competitive forces must be at work.

This is not to say that wireless cable does not recognize and respect the value of exclusive arrangements. We most certainly do, but only when such arrangements are obtained fairly. Exclusivity today is based more often on technology -- such as whether or not the distributor is coaxial cable, than on legitimate financial considerations -- such as who was the highest bidder.

For this reason, the Wireless Cable Association supports strongly S. 168, "The Cable Television Programming Competition and Consumer Protection Act of 1989," introduced in January by Senator Larry Pressler. This bill would outlaw many of the anticompetitive practices at work in the market today; I respectfully commend it to the Subcommittee's attention. (A discussion of the bill is attached as Exhibit C.)

* * *

In closing, it seems to me that the Subcommittee's options are clear. If you believe, as we do, that the cable industry has now evolved into an unregulated monopoly that poses a serious threat to consumers, and that this threat is exacerbated by the increasing vertical integration between the cable industry and programmers, there are three potential approaches to dealing with the problem.

First, Congress could decide to turn back the clock and re-regulate the cable industry.

Second, Congress could intervene to change the structure of the industry by, for example, requiring MSOs to divest their interests in programmers.

Third, Congress could attempt to stimulate competition and let the marketplace provide consumers with all the traditional benefits of vigorous competition -- such as lower prices, improved service, and increased incentives for technological innovation.

The Wireless Cable Association believes that the third option is the most sensible remedy. We want the opportunity to compete. You have no doubt heard much about a "level playing field" in hearings before this Subcommittee. We are not even asking for a level playing field. We can't afford the luxury of worrying whether the field has rocks or sticks or stones or trees. At this point, we just want to get on the field and be able to compete to provide our service to consumers. In order to do that, wireless cable needs reasonable access to fairly priced programming. We believe we have a good service and one which, if given a chance, consumers would enjoy.

Again, thank you for this opportunity to testify.

JAN-27-89 FRI 16:55 K-SAT

EXHIBIT A

K-SAT BROADCASTING

Dish Information Systems House (D.I.S.H. HEADQUARTERS)

Post Office Box 1069
Gilroy, California 95021
Office Telephone 408-848-5558

Fax # 408-848-5571
BBS # 408-848-6915
Telestar 303 - Tr. 19 - 6.8 Audio

CABLE SUBSCRIBER BILL OF RIGHTS

This petition is a **CALL OF ACTION** to the 101st Congress to re-visit the Cable Deregulation Act of 1984 and amend it so as to bring effective competition in and out of cable areas.

We believe the cable systems are operating without effective competition and are therefore afforded monopoly status by the Deregulation Act of 1984.

We believe that alternative technologies should be given enhanced status to effectively compete in cable areas.

We believe that where a single cable system exists without 25% penetration by alternative technologies (dishes, wireless, pc, smatv telco, etc.) cities should be allowed oversight of the rates, channels, and service in a "public utility status".

We believe that where a cable system has public utility status the operator should not have a financial interest either direct or indirect in more than 5 of the channels selected for the system.

We believe that the subscribers 1st Amendment rights are of greater concern than the cable companies therefore all editorials or issues of controversy initiated over the cable by the cable owner or cable industry and are answerable on an equal access basis.

We believe that all local broadcast, and C-span 1 and 2 should receive first priority placement on cable channels.

We believe that multiple hook-ups to cable by a subscriber in their home should not cause an additional fee (like telephone jacks).

We believe that cable programming should be made available on a nondiscriminatory basis to alternative technologies through third party distributors for competitive delivery.

We believe that undisclosed gifts of cable programming and services to appointed or elected officials constitutes a bribe and should be illegal.

We believe that cable systems operating as "public utility" status must spend a designated percentage of profits to expand their area of services into unserved areas rather than to buy other systems or invest in ownership of channels.

We support the Association of States Attorney Generals investigation into antitrust activities by cable and believe this should be investigated by the U.S. Attorney General and the Federal Trade Commission.

Please gather signatures and return petition on other side to K- SAT Broadcasting, P.O. Box 1069, Gilroy, California 95021. They will be submitted in bulk on your behalf.

EXHIBIT B

TESTIMONY OF

ROBERT L. SCHMIDT

PRESIDENT

THE WIRELESS CABLE ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW
COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

ON THE

PROPOSED TIME-WARNER MERGER AND COMPETITION POLICY

MARCH 14, 1989

STATEMENT OF ROBERT L. SCHMIDT
President
Wireless Cable Association

Good morning, Mr. Chairman and members of the House Judiciary Committee. It is a pleasure to be invited to present the views of the Wireless Cable Association concerning the proposed merger of Time, Inc. and Warner Communications. In light of the magnitude and importance of this transaction, I am sure there must be many who are eager to participate in these hearings, so we appreciate this opportunity very much.

The Wireless Cable Association has grave concerns about this proposed combination. Our concerns focus on the impact of the merger on competition in the delivery of television programming by cable and other technologies such as wireless to consumers.

Simply stated, we're concerned that the proposed merger, if permitted to take place on the terms proposed, would create a monopoly over pay television programming that would make it virtually impossible for potential competitors to enter the market and compete effectively. Time, Inc. owns two premium movie channels, HBO and Cinemax. Warner, of course, owns movie and television production and syndication enterprises and a substantial movie library. Both companies operate many cable systems across the country -- indeed, Time's cable subsidiary is the second largest in the country and Warner's is the fifth largest. The combination of these two giant corporations could sound the death knell for competitors of big cable who need the programming owned by these companies to compete. The experience of my industry serves to illustrate this point.

For all practical purposes, wireless cable is cable. The major difference is that over-the-air frequencies are used rather than coaxial cable lines to deliver a full complement of broadcast and satellite-delivered program services to subscribers. Our industry did not really come into being until very recently, as the result of a series of FCC orders which made approximately 33 channels available.

Since then, the single most significant barrier to getting our service up and running has been obtaining popular programming such as HBO and Cinemax -- both of which are owned by Time, Inc. -- and other major programming such as Showtime and ESPN. We are being denied such programming because the big cable operators want to keep us, as well as some small cable companies, out of business. Big cable does not want "upstarts" challenging their local monopolies and their ability to raise prices.

We are concerned that the proposed combination of Time, Inc. and Warner would reduce even further wireless operators' ability to obtain programming. If the people who own HBO and Cinemax, the very people who are now saying "No" to wireless cable operators in response to our requests to carry their programming, also own the vast film libraries at Warner and the Warner movie and television production enterprises, their ability to foreclose access to high-quality programming by wireless cable operators will be substantially strengthened.

We also are concerned that the proposed merger would exacerbate the lack of competition in pay TV services. Cable television operators are, in virtually all of the communities across the country served by cable systems, local monopolies. In only 1 percent of the 8,000 communities served by cable systems do consumers have a choice between competing systems. Further, cable is an unregulated monopoly throughout nearly the entire country. Since the enactment of the 1984 Cable Act, local and state governments throughout the country are precluded from regulating cable television rates. The result, not surprisingly, has been gigantic increases in cable television rates. The proposed merger would further consolidate cable's monopoly pricing power. Time, Inc's cable subsidiary is already the second largest operator in the country; Warner's cable subsidiary is the fifth largest. The combination of these interests, combined with their parents' control of programming, would create an entity virtually immune from competition by operators who lack comparable resources.

We are concerned, too, that a Time-Warner merger would be a harmful blow to program diversity for consumers. Would the cable system of Time and Warner, as combined, be the exclusive way to see HBO or Cinemax? Would HBO have the exclusive cable right to exhibit Warner's films? Significantly, this merger is just the most recent event in a trend that has been building for some time. In the last three years not a single new programming service has been launched in which big cable has not had a significant ownership or controlling interest.

We recognize that some are trying to defend this merger by claiming that it is necessary for the companies to compete internationally. We, too, recognize the importance of strengthening this country's position in international trade. However, no matter how important that goal, it cannot justify short-changing the interests of the American consumer. There is no "international trade exemption" to the antitrust laws, as this committee well knows. We must balance our interests in international trade and in domestic competition, and ensure that we do not sacrifice the individual consumer in the process.

In closing, I would like to share with the committee the Resolution passed by the Wireless Cable Association:

WIRELESS CABLE ASSOCIATION, INC.
2000 L Street, NW * Suite 702 * Washington, DC 20036 * (202) 452-7823

March 13, 1989

WIRELESS CABLE ASSOCIATION

RESOLUTION ON THE TIME, INC./WARNER COMMUNICATIONS MERGER

WHEREAS, Time, Inc. and Warner Communications have recently announced their intentions to merge to create a media giant valued at $18 billion; and

WHEREAS, the Time-Warner combination would join the second largest cable operator, American Television and Communications Corporation (ATC), owned by Time, Inc. with Warner Cable Communications, the fifth largest MSO; and

WHEREAS, cities are virtually precluded from regulating cable television rates by the 1984 Cable Communications Policy Act and the wholly unrealistic "effective competition" standard currently relied upon by the FCC; and

WHEREAS, throughout the country at the local level, cable is an unregulated monopoly, with less than one percentage of the 8,000 communities served by cable having a choice of cable companies; and

WHEREAS, the Wireless Cable Association joins those who have serious concerns that the Time/Warner merger may have an adverse impact upon competition and diversity in the communications industry and upon consumers; and

WHEREAS, the single most significant barrier facing Wireless Cable Association members in serving consumers and competing head to head with cable television systems is the inability of qualified, secure and financially sound wireless cable systems to obtain the rights to carry popular programming such as HBO and Cinemax, now owned by Time, Inc.; and

WHEREAS, such programming is being denied to Wireless Cable Association members in order to frustrate the emergence of competitors to cable systems such as those owned or controlled by Time, Inc.'s MSO, ATC.

IT IS THEREFORE RESOLVED BY THE WIRELESS CABLE ASSOCIATION THAT:

1. The Wireless Cable Association should immediately request hearings in both the United States House of Representatives and the United States Senate to examine the proposed merger of Time, Inc. and Warner Communications and its effect on the accelerating trend toward concentration of horizontal power among a few cable MSOs and vertical integration between large MSOs and programming sources. Specifically, the hearings should address the impact of the proposed merger on the emergence of competition in the local geographic markets. The ability of potential competitors to obtain popular programming such as HBO, Cinemax,

Showtime and ESPN which are necessary to compete; the availability of diverse programming to consumers; and, finally, the impact on cable television prices and service.

2. The Wireless Cable Association should urge all appropriate Federal and State antitrust authorities to carefully investigate the potential consequences to competitors of the proposed merger.

3. In order to protect the public interest in preventing further damage to competition and in stimulating the emergence of competitors of cable television, the United States Justice Department should not approve the proposed Time, Inc. - Warner Communications merger unless it receives assurances from the parties to the transaction that HBO, Cinemax, and other programming services owned or controlled by the parties to the merger will be made available to wireless cable operators on terms and conditions comparable to those received by cable operators.

4. If the parties to the merger do not make such assurances as to the availability of their programming, the merger should not be permitted to be consummated without first requiring the divesture to independent ownership of either the parties' cable systems or their programming products (HBO and Cinemax of Time, and the movie and television studios and film library of Warner).

TESTIMONY OF

JAMES M. THEROUX

PRESIDENT

METROTEN

BEFORE THE

SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW
COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

ON THE

PROPOSED TIME-WARNER MERGER AND COMPETITION POLICY

MARCH 14, 1989

STATEMENT OF JAMES M. THEROUX
President
MetroTen

Good morning, Mr. Chairman and members of the Judiciary Committee. My name is James Theroux and I am President of a wireless cable company operating in the Cleveland, Ohio area. We use wireless cable to offer a basic package which includes ESPN, CNN, CBN, C-Span, Univision (spanish language), BET, WGN, WTBS, WOR, USA, MTV, Nashville, Discovery, Nickelodeon, the three major networks, Fox, PBS, 2 independent stations and a free remote control for $10.95 per month to our approximately 15,000 subscribers. We also offer Showtime and the Disney channel for extra charge. We have not been able to offer HBO, Cinemax, The Movie Channel, American Movie Classics, Arts & Entertainment, Viewers Choice Pay-Per-View, and other channels.

You are considering the ramifications of a very large merger between two communications giants -- Time, Inc. and Warner Communications. What I have to add to your deliberations concerns the real life experience of attempting to negotiate a simple license agreement with HBO, owned by Time, Inc., so that we could offer HBO to our present and future subscribers.

We have been attempting to purchase HBO, the most popular cable movie channel, for sale to our customers since 1984. Over these several years, we have repeatedly called, written, and made other attempts to communicate with the executives of HBO for the purpose of negotiating an agreement to sell their product. They have used every trick in the book to avoid us, including just plain ignoring us. On those few occasions when they have communicated with us, they have said they are reluctant to do business with us for two reasons: signal security and financial capability. Both of these so-called "concerns" lack merit.

On the issue of signal security, we use the Zenith "Z-tac" system. This is the same scrambling device used by many of the cable systems to which HBO sells. In fact, the cable competitor in the Cleveland market, North Coast, uses a scrambling system by Zenith which is not as sophisticated or as secure as Z-tac, but it nevertheless carries the HBO signal. Thus, the argument concerning signal security is wholly false. I believe that HBO knows that it is false.

HBO also says it is concerned about the financial responsibility of our company. In response, we have offered to pay them a full year advance payment for 10,000 subscribers; we have offered to pay them a signing bonus; we have offered guarantees and every other conceivable financial responsibility mechanism. Further, our company is financed by TA Associates -- one of the largest and most responsible venture capital firms in the United States. There is no basis whatever for HBO's expressed concern about financial responsibility and viability. I believe that HBO knows that as well.

I believe that the only reason HBO refuses to negotiate in good faith with us and to sell us their product is because HBO is owned by Time, Inc. which also owns American Cable Television, a major Multi System Operator "MSO." MSOs believe that wireless cable operators such as MetroTen will limit their ability to increase their rates if we are allowed to compete for customers in the same service areas. The cable interests are therefore exerting their power and influence over the cable programming sources to refuse the product to wireless cable operators.

As a businessman on the line each day trying to offer to the citizens in our service area a strong competitive alternative to the wired cable systems, I can tell you that the combination of Time and Warner will make life even more difficult than it is now. It will foreclose further our access to name-brand programs and high-quality movies for transmission to our customers. I urge you to encourage the federal antitrust authorities to investigate the merger and to take action to stop the harmful consequences, either by prohibiting the merger or by requiring divestiture of conflicting assets.

Thank you for the opportunity to present these views.

EXHIBIT C

Pressler bill levels playing field for cable competitors

Bill promotes television competition and consumer choice

By Nick Allard and Deborah Chaskes

Pledging to end illegal price discrimination and exclusive distribution arrangements that prevent millions of Americans from viewing popular cable television programming, Senator Larry Pressler (R-SD) recently introduced S. 168, The Cable Television Programming Competition and Consumer Protection Act of 1989.

This legislation fulfills a promise Senator Pressler made last October to the wireless cable industry at its annual meeting in Crystal City, Virginia. Diverse business groups representing alternative television technologies as well as consumer groups are now mobilizing behind S. 168 and other legislative initiative.

First of many efforts

The Pressler bill is the first of many efforts expected this year not only on Capitol Hill, but also by federal and state law enforcement agencies to curb alleged anticompetitive practices by the established cable industry.

"I want farmers and ranchers who cannot get cable but own satellite dishes to be able to purchase the programming they want at a reasonable price," Senator Pressler explained, as he introduced his bill. The Senator continued: "I want to protect the small cable operators in the small towns of rural America from being priced out of the market for premium programming. I want rural and small town Americans to be able to receive this programming from their local wireless cable operator."

Cable announces opposition

The National Cable Television Association immediately announced its vigorous opposition to Senator Pressler's bill. NCTA President James P. Mooney feared that the bill, "if enacted, would amount to nationalization of the cable programming industry."

Wireless Cable Association President Robert L. Schmidt responded, "I can understand why Mooney has nationalization on his mind in view of the accelerating concentration and consolidation of market power in the hands of big cable." Schmidt continued, "all the bill would do is promote competition and give consumers a choice. If that's nationalization, then that is what this country is all about. We don't want a special break or a bailout, all we ask is a fair chance to enter the marketplace and compete for consumers. Senator Pressler's bill will go a long way toward helping us to achieve that goal."

Outlaws two practices

The technology neutral legislation outlaws two practices – price discrimination and exclusive distribution arrangements – when either is intended for the purpose of denying competing distributors access to popular programming that is needed to offer consumers a competitice package of services.

> **'I want rural and small town Americans to be able to receive this programming from their local wireless cable operator.'**

As drafted, the bill is not intended to interfere with a businessman's right to transact business with whom he chooses, as long as his reasons are legitimate and not anticompetitive.

No discrimination clause

The bill's first provision makes it illegal for any person to "discriminate in price, terms or conditions in the sale or offering for sale of satellite-distributed programming" among competing retailers of such programming, with one exception. Price differentials would be permitted where they "only make due allowance for differences in the cost of creation, sale or delivery" of programming.

The second provision of the bill makes illegal any exclusive distribution arrangement, unless the person who benefits from the exclusivity can show:

1. the particular programming is not needed to compete effectively in the community; *or*
2. there is no one competing for the programming in the community; *or* if there are competitors, the programming was offered at nondiscriminating terms to all competitors.

Exclusivity permitted

Jim Theis, legislative assistant to Senator Pressler, explained that this last defense is intended to permit exclusivity when it is obtained fairly by the "highest bidder."

According to sources close to this issue, additional possible defenses were not included at the urging of some home dish interests, which expressed concern that the bill, as originally drafted, was not tough enough.

Senator Howard Metzenbaum (D-OH) – a champion of cable television consumers' interest in the last Congress and who, as chair of the Senate Antitrust Subcommittee, has lead responsibility for antitrust issues such as those raised in the Pressler bill – will no doubt be taking a close look at Senator Pressler's legislation. Senator Metzenbaum has already announced that he intends to introduce legislation this session that would strengthen municipal authority to regulate cable rates, and that he will continue his investigation of vertical integration in the cable telebision industry.

Efforts to reinforce bill

Knowledgeable Capitol Hill staff predict that Senator Metzenbaum's efforts will reinforce and complement, rather than detract from, Senator Pressler's initiative.

A number of well-organized and influential consumer groups will also be heavily involved in the 101st Congress consideration of issues affecting the cable television industry. The so-called "K-Sat Army" launched its "Take A Bite Out Of Cable" campaign last fall shortly after the defeat of Senator Al Gore's (D-TN) home dish bill (S. 889). This group, along with a number of others, is calling on the 101st Congress to amend the Cable Act of 1984 in a manner which promotes increased competition. Enactment of a "Cable Subscriber Bill of Rights," already adopted by many communities, is also high on the consumer groups' agendas.

State law enforcement officials, in a move that parallels the Congressional activities, are continuing their investigation of the cable television industry. Ray marvin, co-counsel to the Wireless Cable Association and former executive director of the National Association of Attorneys General (NAAG), expects that NAAG's special antitrust task force will report its preliminary findings at the NAAG meeting in Washington, DC, this March.

Additional sponsors sought

Senator Pressler is now seeking additional sponsors for his bill, and has re-

101st CONGRESS
1st Session

S. 168

IN THE SENATE OF
THE UNITED STATES

Mr. Pressler introduced the following bill, which was read twice and referred to the Committee on ________________

A BILL

To promote competition in the distribution and sale to consumers of satellite-distributed television programming.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

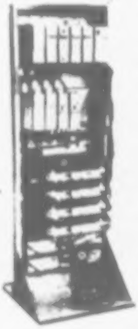
This Act may be cited as the "Cable Television Programming Competition and Consumer Protection Act of 1989".

SEC. 2 FINDINGS.

The Congress finds and declares that –

(1) competition in the evolving market for the delivery of satellite-distributed programming into the home is in jeopardy.

(2) a study of cable television published last year by the National Telecommunica-



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tions and Information Administration (NTIA) revealed that there is significant horizontal concentration and consolidation of power among a few multisystem operators (MSOs), with four companies controlling over 40 percent of the market;

(3) through vertical integration there is further concentration and consolidation of market power and control over sources of programming. For instance, there has been no new satellite programming for the general public via cable television in the last three years in which a multisystem cable operator has not taken an equity interest;

(4) since the deregulation of the cable industry, consumers have experienced substantial price increases without any accompanying enhancement or improvement of service. An October 1988 General Accounting Office study, for example, found that rates had risen an average of 27 percent over the past two years;

(5) since the deregulation of cable, there has been substantial consumer dissatisfaction with the quality and availability of service;

(6) there are or could be in the future several alternative means of competing with multisystem cable operators for the delivery of satellite-distributed programming into the home, including cable overbuilds, wireless cable, SMATV, satellite dish technology, fiber optics, and DBS;

(7) the ability of any retailer of satellite-distributed programming to enter the marketplace and have a fair chance to compete depends on the ability of the retailer to obtain programming on fair, nondiscriminatory terms and conditions and to offer potential customers the kind of programming preferred by consumers;

(8) programming is not available to competitors and potential competitors on nondiscriminatory terms and conditions. The NTIA found, for instance, that "small" cable companies are charged rates five times those charged MSOs for the same programming. Senate hearings held in the last session of Congress revealed that programmers often decline to sell their programming on any terms to competitors of the large cable concerns; and

(9) stimulating competition among alternative retailers by affording access to programming will be beneficial to consumers and the existence of a competitive market for satellite-distributed programming is most likely to avert the need for new government regulation or government intervention in the industry structure affecting the market.

SEC. 3 PROHIBITION AGAINST PRICE DISCRIMINATION AND ANTI-COMPETITIVE EXCLUSIVITY

Section 2 of the Act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 13), is amended–

(1) by redesignating subsection (f) as subsection (h), and

(2) by inserting immediately after subsection (e) the following new subsections:

"(f) It shall be unlawful for any person to discriminate in price, terms, or conditions in the sale or offering for sale of satellite distributed programming among retailers who purchase for the purpose of distributing such programming to consumers; except that nothing in this sub-section shall prevent differentials which only make due allowance for difference in the cost of creation, sales, or delivery of programming to such retailers.

"(g) It shall be unlawful for any person seeking to obtain satellite-distributed programming for distribution or resale to enter into, extend, renew, or continue a contract or agreement for the distribution or sale of any satellite-distributed programming service which has the purpose or effect of establishing an exclusive distributorship for such programming service to consumer within an area for which a cable franchise has been awarded, unless –

"(1) the particular programming service is not necessary to compete effectively within the franchise area;

"(2) there is no competitor seeking to deliver satellite programming to consumers in the subject franchise area; or

"(3) if there are any competitors in the subject franchise area, such programming service was offered at nondiscriminatory prices, terms and conditions to all of the competitors who request such programming in writing without regard to the type of technology the competitor would use to deliver the programming to home viewers."

quested the Senate commerce committee to hold hearings on the bill early this spring. Hill observers expect also that Senator Metzenbaum's antitrust subcommittee will hold hearings on cable issues early in this session, and that the House telecommunications subcommittee will resume its hearings on the 84 Act.

From the heavy cable oversight agenda already planned for the first session of the 101st Congress, it is clear that the introduction of the Pressler bill signals only the opening bell in efforts to increase consumers' access to cable television programming at fair prices.

Washington observers say that whether or not such consumer legislation is enacted this year, the established cable industry will have to account for its dominant position in the marketplace. If legislators are not satisfied that cable is acting responsibly, that it does not have its own house in order, then it will be difficult for cable to find sympathetic ears on Capitol Hill when the industry pushes its own legislative program, including its all out effort to block telco entry into the market.

About the authors

Nicholas W. Allard and Deborah M. Chaskes are engaged in a legislative and regulatory practice in Washington, DC, with the law firm of Fox, Weinberg and Bennett.

Allard is former legal counsel to Senator Edward M. Kennedy (D-Mass.) and chief of staff to Senator Daniel Patrick Moynihan (D-NY). As staff for these senators, Allard drafted many pieces of major legislation and organized Senate hearings on a number of topics. A Rhodes Scholar, he has degrees from Princeton, Yale and Oxford.

Allard

Chaskes

Chaskes is a former litigator for the U.S. Department of Health and Human Services (HHS), with substantial litigation and legislative experience in private practice. Ms. Chaskes is a graduate of the University of Michigan and its law school.

Senator METZENBAUM. Thank you very much.

Professor Ordover?

STATEMENT OF JANUSZ A. ORDOVER

Mr. ORDOVER. Mr. Chairman, thank you very much for the invitation to testify at this important hearing. In my oral remarks, I will address two key public policy questions regarding the 1984 Cable Act and its implementation.

First, was deregulation of local cable television based on sound economic principles and compelling empirical evidence? Second, does deregulation conduce to the broadly defined public interest?

My answer to the first question is a resounding no. My answer to the second question is that the policy of deregulation greatly benefited cable system operators, and it may have harmed the viewing public. Thus, based on what admittedly is not entirely satisfactory and complete data, I must at this juncture conclude that deregulation of cable has most likely not benefited the public interest as I would define it.

Let me justify briefly my first answer. In my view, the analysis used by the FCC to gauge the extent of effective competition between cable and broadcast television did not satisfy any standard economic methodology. This is despite the fact that such methodologies were, indeed, spelled out in the Department of Justice Merger Guidelines.

The FCC failed to estimate or even gauge the degree of substitutability between the package of video services offered by cable television and the video services that are available over the air from broadcast television stations. Rather, the FCC seems to have begun with a hunch that cable television competes vigorously in a broadly defined home video market.

Where did the FCC get its three-signals rule? Did it pull it out of a hat? Not quite, but almost, in my opinion. I am, therefore, surprised that serious deregulatory policies toward the cable industry were adopted without what I would consider proper analyses.

Now, what would such proper analyses do? In my view, it would inquire by how much an average cable system operator could jack up subscription prices above the average regulated rates without causing significant defections from cable. My guess at the time would have been that CSOs had a great deal of freedom to raise prices above regulated rates. The main reason for my hunch as opposed to the FCC's, is that what cable offers was and remains very different from what an average TV household can find elsewhere. As it turns out, my hunch has been confirmed by what happened to basic rates since 1985.

I do not want to talk at length about cable subscription rates since so many people talked about them. But, the issue of rates brings me to the reason for my second answer, which is that deregulation most likely did not benefit the broadly defined public. First, an important study by Shooshan and Jackson showed that cable systems are now selling well in excess of three times the replacement cost. While these numbers are probably too high, in my opinion, they do raise serious concerns about the market power and monopoly rents that are being enabled by cable systems.

Second, as I said, there is no need for me to belabor the issue of subscription rates. These increased by over 50 percent since deregulation. In my mind, it would take a lot of hard explaining to justify these increases by depressed regulated rates and by better offerings that are available from the cable systems.

Now, what would be my conclusion regarding what the policy ought to be? I am not in favor of reregulation. I would, however, strongly favor better approaches to increasing competition against cable systems. That would imply facilitating competitive entry into cable by telcos, ensuring that alternative technologies can compete with cable offerings on equal terms, and that networks and independents can compete on equal terms with cable in the marketplace of the future.

Thank you very much.

[The prepared statement of Mr. Ordover follows:]

Does Cable Television Really Face Effective Competition: Thinking About the Cable Communications Policy Act.

Janusz A. Ordover[1]

Testimony before the Antitrust, Monopolies and Business Rights Subcommittee of the Judicary Committee of the U.S. Senate: Hearings on competitive issues in the cable television industry, April 12, 1989.

1. Introduction.[2]

Is cable television a local monopoly or does it face effective intramodal and intermedia competition. An answer to this question must be given before sound public policy toward cable television can be devised. In 1985, the FCC concluded that cable television faces effective competition from broadcast television in those local communities where there are at least three off-the-air television signals available to television viewing households in any portion of the cable community. The Commission found that the availability of three broadcasts signals is enough to ensure an effective competitive constraint on the ability of the local cable system operator (CSO) to charge "noncompetitive" rates and to offer a less than desirable programing mix to subscribers. This "three signals" conclusion was used to implement the rate deregulation provisions of the 1984 Cable Act. The implementation of the 1984 Cable Act, together with the judicial decisions that significantly extended First Amendment protection to local cable operators, thereby removed the cable television industry from almost all regulatory scrutiny.

In my testimony, I will address two key public policy questions regarding the 1984 Cable Act and its implementation. First, was deregulation of local cable television based on sound economic principles and compelling empirical evidence; and, second, did deregulation conduce to the broadly defined public interest.

My answer to the first question is a resounding and unequivocal "no."

My answer to the second question is that the policy of deregulation greatly benefited cable system operators and it may have harmed the viewing public. Thus, based on what admittedly is not entirely satisfactory and complete data, I must at this juncture conclude that deregulation of cable has most likely not benefited the broadly defined public interest.

My first answer derives from the assessment that the analysis used by the FCC to gauge the extent of effective competition between cable and broadcast television did not conform to any standard economic methodology.

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[1] Professor of Economics at New York University. I would like to thank Mr. Kenneth Rogoza for assistance in preparation of my testimony.

[2] Some of the material in this written Testimony is drawn from J. A. Ordover (with Y. M. Braunstein), Does Cable Television Really Face Effective Competition?, **INTV Journal**, January 1988. I keep my presentation here at a fairly informal level and thus eschew extensive footnoting, unless absolutely necessary.

In particular, the FCC failed to estimate, or even gauge, the degree of substitutability between the **package** of video entertainment services offered by cable television and the video entertainment that is available over-the-air from broadcast television stations. Rather, the FCC seems to have postulated that cable television competes in a broadly defined "home video market." It then misconstrued the empirical studies that apparently showed that adding a fourth broadcast TV station to a "market" has no statistically perceptible effect on basic cable subscription levels as providing support for the conclusion that three broadcast TV stations suffice for effective competition. It is astounding that far-reaching public policy decisions can be made based on poorly specified empirical studies that do not go directly to the issue of competition between cable and broadcast television.

My second answer derives from empirical evidence on post-regulation changes in basic cable subscription rates and from the measures of market power that compare the sale prices of cable systems to (economic) replacement costs. After deregulation, basic subscription rates increased dramatically. These increases cannot be attributed to inflation; they are, however, consistent with the view that after deregulation, CSOs were able to exercise unrestrained pricing power.[3] Similarly, the measures of market power, as calculated by Shooshan and Jackson, Inc., indicate that CSOs are presently earning monopoly rents.

In sum, the available evidence indicates that cable television did not face effective competition from broadcast television at prices that prevailed prior to deregulation. As a result, CSOs were able to significantly increase subscription rates for basic cable services, as shown later in the testimony, without significantly increasing the quality of basic services to cable subscribers.

2. Effective Competition and Market Power: A Brief Review of Key Concepts.

A firm that faces effective competition is by definition constrained in its ability to earn above-competitive profits over a long-haul. When such a constraint is effectively present, or is expected to significantly intensify in the future, economic regulation is likely to do more harm than good, especially if it is recognized that regulators themselves are subject to capture by industry incumbents and thus prone to making decisions that are not always in the public interest.

Economists have devised a simple summary index of the effectiveness of a competitive constraint faced by a single firm, or a group of firms. That index, often refered to as the Lerner Index, after the economist who first proposed it some fifty years ago, relates a firm's pricing power to the **elasticity of demand** facing that firm.[4] In turn, the elasticity of demand is a summary statistic that measures the percentage loss in sales that the firm would sustain, if it were to increase its existing price by a small percentage amount.[5] It stands to reason that if a firm faces a very high elasticity of demand, its pricing freedom is greatly constrained.[6] The elasticity of demand facing a firm is likely to be very high if: (i) a firm's products/services have a large number of close substitutes; and (ii) if other firms can easily enter the market occupied by the firm.

---

[3] The proponents of deregulation could argue that such price increases were justified because regulated prices were too low to ensure the viability of local cable systems. There is no evidence that local systems were suffering severe financial difficulties. Some of those difficulties could be attributed to ex ante competition for local franchises. The proponents could also argue that the quality of basic services has improved after deregulation. The evidence on this point is very sparse and not persuasive.

When a regulated firm (or industry) faces a high elasticity of demand for its products, either because of wide availability of close substitutes, or because of the threat of entry, regulation is not required to ensure market efficiency.[7] Proponents of deregulation must, therefore, demonstrate with some degree of confidence that the pertinent elasticities of demand are sufficiently high to obviate the necessity of economic regulation. The FCC did not base its policy proposal for deregulating cable on sound estimates of the elasticity of demand for basic cable services. This is unfortunate because in cable, prima facie evidence, enumerated below, indicates that the pertinent elasticity of demand for basic cable services provided by incumbent CSOs is likely to be low.

3. The FCC's Methodology and its Faults.

Armed with the concept of the elasticity of demand, it is easy to demonstrate severe methodological problems with the FCC's analysis of competition between cable and over-the-air television. As I noted above, the correct methodology would be to estimate the elasticity of demand facing CSOs.[8] This methodology is advocated by the most recent Department of Justice Merger Guidelines first issued in 1982.[9] Under the Guidelines, the policy question would have been whether an elasticity of demand facing a regulated CSO is sufficiently high to render unprofitable a hypothesised price increase of, say, 10 percent. We already know that the lower is the elasticity of demand the more likely it is that such a hypothetical price increase would be profitble. Implicitly, the FCC must have concluded that in those markets where there are three high quality over-the-air television signals, CSOs face a significant elasticity, at the existing prices.

---

[4] For more on this index, see Landes and Posner [1981], Ordover and Willig [1982], and Schmalensee [1982].

[5] For example, if a firm faces an elasticity of demand equal to five, then a one percent increase in price will reduce that firm's sales by five percent.

[6] The elasticity of demand can theoretically vary from "zero" to "infinity." A single firm always faces an elastic demand at its profit-maximizing price. That is, at the profit-maximizing price, the elasticity of demand must be greater than one.

[7] Here I abstract from other goals, such as fairness, that regulation may wish to promote.

[8] At the simplest conceptual level, the demand in question would be for basic service. It could be measured by the percentage of homes passed that subscribe to cable.

[9] These Guidelines were further explicated and modified in 1984 and in 1988 in the Department's Guidelines for International Opertaions.

What would make the FCC reach such a conclusion, especially in the absence of reliable estimates of pertinent demand elasticities?

Let me focus on a hypothetical community, which I call Videoville, whose residents can receive a number of broadcast TV signals. Videoville's franchised CSO provides a cable service that only offers retransmission of over-the-air signals. The quality of those signals is, however, better than what TV homes can receive on their sets. It stands to reason that if the quality of reception on cable is better, TV households would be willing to pay something for it.

The price that the citizens of Videoville would be willing to pay depends (in part) on how poor is signal quality without cable. If that quality is very poor, households may be willing to pay a great deal. This would imply that Videoville's CSO faces a low elasticity of demand for its service. As a result, a CSO may[10] earn substantial profits from providing superior quality, because households cannot turn to another CSO to obtain a competing service. Conversely, if over-the-air quality is excellent, the price for superior quality avialable on cable will be low, meaning that the CSO faces a high elasticity of demand for its services.

Of course, it is most likely that in my hypothetical Videoville, not all over-the-air signals are of equally poor quality. Thus, if the signals from the three networks are of good quality, it is not likely that the CSO will have much pricing power, if we were to believe the FCC's 1984 analysis. On the other hand, if only two networks are received well in Videoville, the CSO may still be able to charge a very high price for superior reception of the third network.

4. Uniqueness of Cable's Video Package and its Consequences for Effective Competition.

Obviously, a CSO provides much more than retransmission of the locally available broadcast television. Television households in Videoville are willing to pay for the gamut of additional offerings that are available through cable. The more distinct are these offerings from the standard video fare that is available on broadcast television, the smaller will be the elasticity of demand facing the CSO. Thus, even if TV households in Videoville would not be willing to pay much for the superior reception of broadcast signals (because the reception without cable is of adequate quality) they may, nevertheless, end up paying a substantial amount for the **video package** available on cable.

The analyses performed by and relied upon by the FCC shed only minimal light on the question whether the availability of three TV signals effectively constrains the ability of a CSO to price the additional services that a TV household can obtain by subscribing to cable.

Cable television provides a unique video package that is not available from any other source. It provides better quality access to the very same products with which it competes. It provides access to TV superstations. It provides access to a multitude of programs that are tailored to very specialized viewing preferences (the so called

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[10] I do not say that it will because there are substantial fixed costs in the provision of cable services.

"narrowcasting"). It provides access to specialized services such as home shopping or weather information. And it provides access to the upper-tier (i.e., pay) channels. Since the video package offered by cable is unique and distinct from what is available elsewhere, even though its enjoyment entails sitting in front of a TV, a presumption is that the elasticity of demand facing a CSO is likely to be small, if cable is priced at the level that ensures a normal rate of return to investors.[11]

I have not been able to discover a sensible econometric model that actually estimates the elasticity of demand for cable. However, I want to put forth three pieces of evidence -- or factoids -- that support the view that cable and broadcast TV are not engaged in head-on competition. Firstly, an econometric model of cable prices estimated at Princeton University by Professor Robert D. Willig and one of his students failed to establish any connection between cable prices, including a correction for the pay tier prices, and the number of broadcast TV stations in the community and quality of the available signals.[12] Secondly, TV household viewership data indicates that TV networks, and their affiliates, maintain quite well its share of the viewing public in cable households, both during prime time and in the twenty four hour time period. This suggests to me that cable offerings are not a strong substitute for programming available from TV networks and their affiliates.[13] Thirdly, there is no evidence that penetration in **mature** systems has declined despite significant increases in basic cable rates.[14]

Thus, the preponderance of evidence suggests that cable television is not facing an effective competitive constraint from over-the-air broadcast television.

5. **Intramodal Competition is Ineffective in Constraining CSOs.**

Even in the absence of effective competition from broadcast televison, a CSO's pricing and programming power could be constrained by competitive alternatives offered by another CSO, by other video technologies, such as MMDS, SMATV, and DBS, or by the threat of potential entry. Unfortunately, none of those constraints are effective in an overwhelming majority of local cable systems. First of all, the number of localities with two competing cable systems is de minimus. Consequently, in most franchised areas TV households must look to other video technologies for intramodal competitive constraint. Unfortunately, these alternative video technologies have not captured a significant share of the cable marketplace. Finally, no incumbent CSO is currently threatened by potential entry to the degree that would effectively constrain its pricing and programming freedom.[15]

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[11] It should be recognized that the demand for cable is not only driven by the price of basic but also by the price of pay tiers.

[12] Admittedly, various specifications of the regression equation had very little explanatory power.

[13] A possible caveat must be offered. It is plausible that cable households are those that have a substantially above average penchant for watching televison. However, if cable households are only slightly more TV-loving than non-cable households, then my provisional conclusion still stands.

[14] Overall, as a percentage of homes passed, basic's penetration increased from 56.7% in 1985 to 59.6% in 1988, according to the Pay TV Newsletter.

6. Pricing of Basic Cable after Deregulation.

In the absence of an effective competitive constraint on cable rates, one would expect basic rates to rapidly increase after deregulation.[16] The behavior of basic rates after deregulation is one of the most contentious issues confronting the cable industry and public policy makers. The raw data, summarized in Table 1 and Figures 1-3, supports the position that regulation kept the lid on basic rates and that CSOs had a great deal of unexploited pricing freedom.[17] Stated another way, in the presence of effective competition from over-the-air television and other media, cable system operators would experience substantial losses in penetration if they were to implement price increases of the magnitudes reported in Table 1.

For the sake of analytic objectivity, some *caveats* are, however, necessary. First, basic rates may have been kept below competitive levels by regulators, especially when corrected for inflation. Consequently, CSOs may have been making up the ground lost in the late 1970s and early eighties. Second, some CSOs expanded the number of offerings included in the basic rate. While this is undoubtedly true, there is no evidence that what cable subscribers got was worth the price. Third, subscription rates for pay tiers were lowered by some CSOs. As a result, the price of a full **video package** offered by a CSO may have increased by a much smaller amount for a subset of cable subscribers. In my view pay prices would have most likely declined even in the absence of deregulation because pay tiers are experiencing increasing competition from VCRs.

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[15] In the parlance of modern industrial organization economics, cable television is not a *contestable* market.

[16] This is under the assumption that regulators kept those rates below their profit-maximizing levels.

[17] Table 1 shows prices and percentage changes for monthly basic rates in two different manners. Column 1 shows the average price of basic for companies that were granted rate hikes by local authorities through 1979-1986 prior to the increase. The 1987 price refers to the average rate companies had that increased their prices during the first six months of 1987 no longer subject to rate regulation. The second column shows the average basic rate for those companies that had their rate hikes approved in any given year. The third column shows the percentage increase in basic rates for those companies that had rate hikes approved in any given year prior to 1987 and the average basic rate for just those companies that had raised their rates during the first six months of 1987. The fourth column shows the industry average basic rate prevailing in any given year (includes rates of companies that had rate hikes as well as those that did not raise their rates as well as those that decreased their rates). Figures 1-3 show how basic rates have changed between 1979 and 1987 and contrasts the percentage increases of basic rates with two measures of changes in the Consumer Price Index (one including all expenditure categories and one for entertainment expenditures. I do not have pertinent data for 1988. However, industry sources indicate that the 1988 industry average basic rate increase will also have been in double digits.

Nevertheless, after balancing the available evidence on the movements of basic cable rates in the deregulated cable marketplace, I must conclude that cable subscribers did not visibly benefit from the deregulation of basic rates, and, in fact, were probably harmed by deregulation. There is no doubt that CSOs benefited from deregulation.

7. **Estimates of Cable's Market Power**.

The consulting firm of Shooshan and Jackson, Inc., offered estimates of cable's market power that rely on comparison of prices for which cable systems are sold (on per subscriber basis) to "reproduction costs" also expressed on per subscriber basis.[18] This comparison, when expressed as a ratio, is commonly refered to as Tobin's q ratio, after the economist who first devised it. The basic idea is that in a competitive, or a contestable, market, a firm's assets ought to sell for a price that approximates their (re)production costs.[19] Conversely, when this ratio significantly deviates from 1.0, it is plausible that the firm possesses market power.[20]

Shooshan and Jackson, Inc. offer estimates of Tobin's q for cable systems in the range of 2.8 to 3.2 for 1986, and in the range of 3.6 to 4.36 for 1987. Even if we were to allow for a significant undervaluation of intangible assets, ratios of this magnitude should raise serious public policy concerns regarding cable's market power.[21]

8. **What's to be Done?**

I do not think that it is possible (or even wise) to go back to regulating cable systems in a traditional manner. Furthermore, cable rates cannot at this point be rolled back without partly expropriating those who purchased cable systems after 1985. Consequently I would argue that the FCC ought to devise a system residual economic regulation that would place a dynamic cap on the pricing power of CSOs and that it actively promotes intermedia and intramodal competition in the home video market. The FCC should also disabuse itself of the notion that over-the-air broadcast television is currently effectively constraining CSOs' (and MSOs') conduct.

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[18] See, "Opening the Broadband Gateway: The Need for Telephone Company Entry into the Video Serviices Marketplace," Washington, D.C., October 1987, and "Measuring Cable's Market Power: Recent Developments," Washington, D.C., December 1988. See also H. M. Shooshan, III, "Cable Television: Promoting a Competitive Industry Structure," for a methodological discussion of the approach.

[19] When these assets include intangibles, such as goodwill, the estimation of (re)production costs is far from trivial. It does not seem that CSOs possess many intangible assets. Consequently, distortions due to possible undervaluation of these assets in the estimates provided by Shooshan and JAckson, Inc., are probably insignificant.

[20] A competing interpretation is that the firm whose q exceeds one possesses an "innocent", or a "procompetitive", efficiency advantage over other firms. This is an interpretation that is favored by Chicago-school economists.

[21] I do not think that such values of the q-ratio could be attributed to efficiency advantages of the already franchised cable systems over future entrants.

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TABLE 1

Cable Television Industry Basic Rate
Increases Before and After Deregulation
(1979-1987)

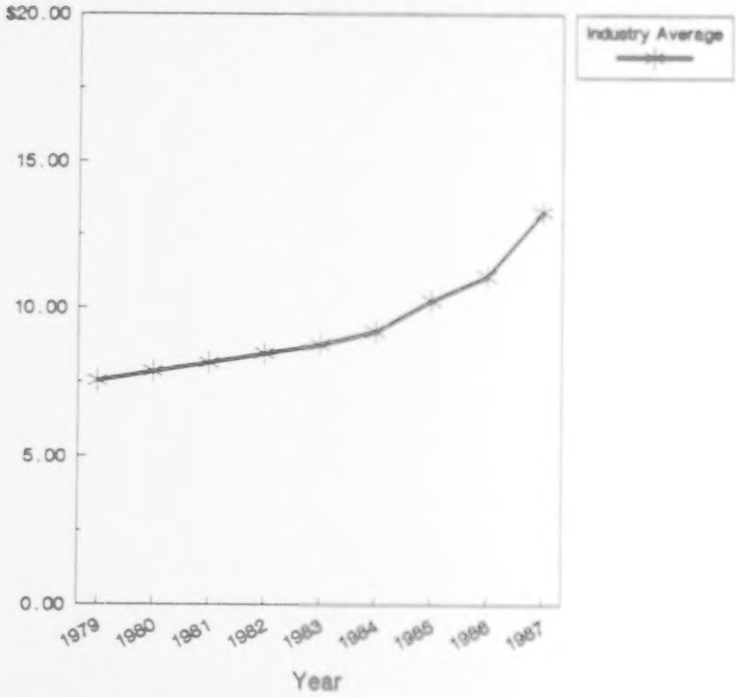
	Average Old Rate of CSOs before P Inc	Average Rate Increase of CSOs that Inc P	Percentage Increase of CSOs that Inc P	Industry Average Basic Rate	Percentage Increase of Industry Average
1979	6.75	7.76	14.96	7.54	
1980	7.03	8.08	14.94	7.86	4.25
1981	7.32	8.36	14.21	8.14	3.56
1982	7.70	8.88	15.32	8.46	3.93
1983	7.92	9.22	16.41	8.76	3.55
1984	8.31	9.79	17.81	9.20	5.02
1985	9.00	10.23	13.67	10.24	11.30
1986	9.51	11.41	19.98	11.08	8.20
1987	10.26	12.70	23.78	13.27	19.70

Source: Paul Kagan Associates, Cable TV Franchising and Programming Reports, various issues.

For an explanation of the data, refer to footnote 17 in text.

FIGURE 1

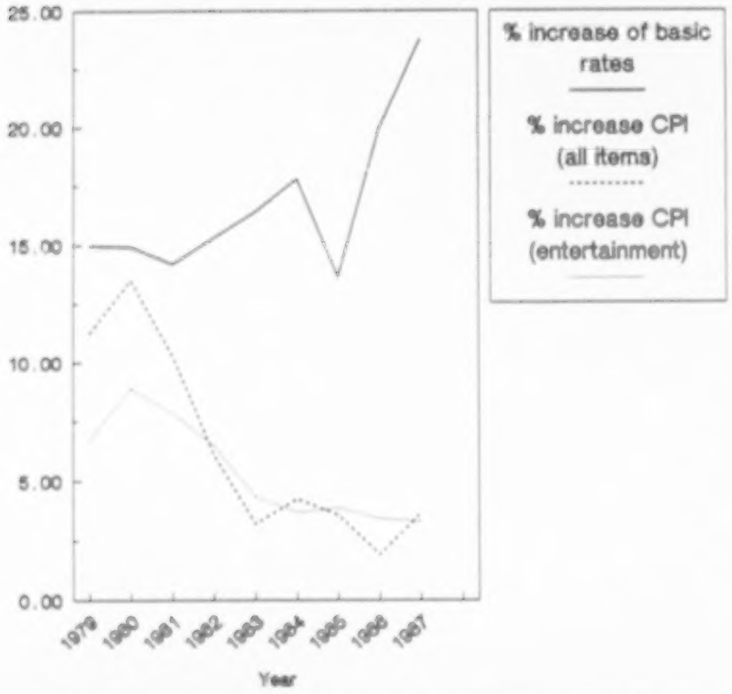
Cable Television Industry
Industry Average Basic Rate/Month
(1979-1987)



Source: Paul Kagan Associates, Cable TV Franchising Report, Various issues and Cable TV Programming Report, July 29, 1988.

FIGURE 2

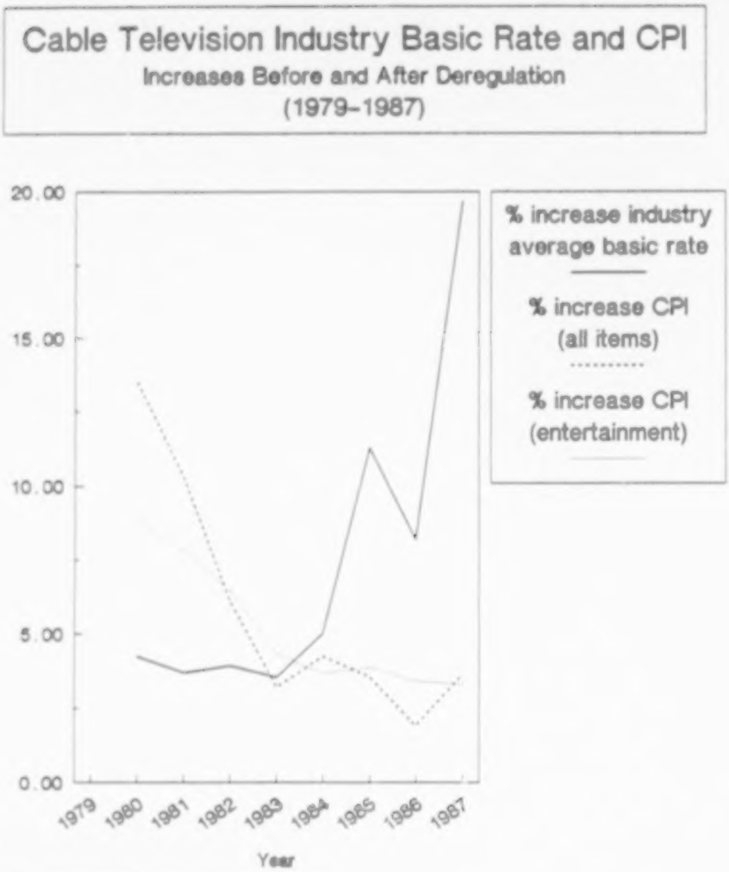
Cable Television Basic Rate and CPI
Increases Before and After Deregulation
(1979-1987)



Source: Paul Kagan Associates, Cable TV Franchising and Programming Reports, various issues.

Basic rate increases shown here are only for those companies which were granted or had reported price increases.

FIGURE 3



Cable Television Industry Basic Rate and CPI
Increases Before and After Deregulation
(1979-1987)

Source: Paul Kagan Associates, Cable TV Franchising and Programming Reports, various issues.

Senator **Metzenbaum**. Thank you very much, Professor Ordover.

Mr. Fritts, do you think there ought to be limits on horizontal concentration in the cable industry similar to the limits imposed on broadcasters?

Mr. **Fritts**. Senator, you touched on an area that points out the unfair competition. In many respects, broadcasters continue to be regulated in different ways, while cable obviously has none of those restrictions. Clearly, if broadcasters are going to be restrained by certain restrictions, we think it is only fair that we compete fairly. Therefore, we would conclude that, yes, there should be some serious consideration of that.

Senator **Metzenbaum**. The claim is made that the broadcasters are complaining about cable because it is cutting into television's viewing share and advertising revenues. How would you respond to that?

Mr. **Fritts**. What this subcommittee is doing under your leadership is to look at the cable model, what has happened in the last 5 years to review what has taken place, the changes in the market place. And if you go back 5 years ago and determine where broadcasting was and where cable was, and you evaluate it today and you look at projecting that same model for 5 years or maybe even 10 years down the road, then I think that you see that the fragmentation that has occurred would continue to occur.

The problem is not so much that there is competition, because we believe in healthy competition, and our industry will compete with the best of them. The problem, Senator, is that the cable systems own the conduit, and they have the ability to control which stations can compete with them. In no other model do I know of can this take place.

Senator **Metzenbaum**. A story was related to us today about a gentleman who owns a TV station in San Francisco, and I remember that situation very well. I thought it was a pretty raw deal then. Are you particularly familiar with the fact situation?

Mr. **Fritts**. I am familiar with that one, and I have a letter that I received yesterday from Rockford, IL, concerning a similar situation to that. The four local Rockford, IL, TV stations have been moved to Channels 39, 40, 41 and 42. Unfortunately, the cable converter which allows people to watch cable only goes up to Channel 36. Consequently, there is no one who can watch them. To me, that is beyond the bounds of propriety.

Now, they did say that you could rent a converter that would allow you to do that for $2 a month. Conservatively figured, that is $600,000 additional per year for the cable system, number one; and, number two, they said you could only have one per home, and you had to wait in line to get them because they do not know when they will get any more.

As a result, the Rockford, IL TV stations, many are now on those channels which cannot be viewed by anybody, have lost one of their counties from their marketing area, which drops them in the national ratings from Market 104 to 139. And that means that when that market drops in ranking, it is going to have severe financial penalties for those stations.

Senator **Metzenbaum**. Mr. Fritts, that is absolutely shocking information. So shocking that I would like you to remain after the hearing, provide my staff with that information; we will send it to the Antitrust Division, because I believe that may be a prosecutable offense. I think that is a concentration of economic power, and I think it is an abuse of the laws of this country. I do not know if it is or not, but I think the Antitrust Division of the Department of Justice ought to look at it.

One last question, Mr. Fritts. One thing that nobody talks about is the fact that as cable gets bigger, inevitably free TV has to fight for its economic existence. There is no secret about it. Your stations at the moment are strong. But some have said that if cable continues to amass economic power, and continues to amass the ability to keep TV stations from the viewers, then the American consumer's ability to receive free TV services may be threatened. Do you think that that is a realistic concern?

Mr. FRITTS. Senator, I think if the Government, starting with this committee, begins to look at the possibility of reregulation, there are steps that it can take to prevent that from happening. As we have recommended, the first of those steps would be imposition of must-carry rules and channel repositioning rules. With these rules, the cable industry would be providing, alongside of their services, the free, over-the-air television stations which are licensed by the Government to serve a specific area, but which now can be precluded from serving that area by the cable monopoly. So we would certainly think that this would be a step in the right direction.

Senator METZENBAUM. Mr. Padden, we often hear that cable systems represent a bottleneck distribution facility at the local level. What does that mean, and what impact does it have on independent TV stations and other unaffiliated programmers?

Mr. PADDEN. Well, Mr. Chairman, it means there is one toll booth into the home. We have heard a lot today about whether over-the-air television provides effective competition to cable. There are just very many different circumstances under which consumers are totally reliant on cable for their access to any kind of television, including broadcast television. That includes areas with hilly or mountainous terrain or the concrete canyons of our cities. And if you are not on that cable system, consumers simply have no access to your programming.

Senator METZENBAUM. I am sorry, I turned away for a minute. Would you just repeat that last statement?

Mr. PADDEN. Certainly. If you do not have access through the cable conduit to many consumers, the consumer has no access to your programming. And there is no way you can even compete, let alone be viable.

Senator METZENBAUM. You have recently described a Florida cable company's negotiating techniques as "a shakedown." Could you describe what happened in that situation?

Mr. PADDEN. Certainly. The FCC just readopted syndicated exclusivity rules so that local stations that negotiate exclusive program rights can realize the rights they have negotiated. And in this instance, the local cable operator walked in and said to the local station: "Well, we are re-evaluating our channel lineup, and we are trying to decide where we are going to put your channel. We want to know if you are interested in giving up your syndicated exclusivity rights that the FCC just gave you?"

Now, since the local station has no forum to which they can presently turn for redress of their grievance, their choices are to give up whatever rights the cable operator asks them to give up, or be totally at his mercy to have their channel position jerked around. And there is no place they can go to get that resolved today.

Senator **Metzenbaum**. They would have to give up their syndication rights?

Mr. **Padden**. They would have to permit the cable operator to duplicate their programming on other channels in order to——

Senator **Metzenbaum**. To stay on their channel.

Mr. **Padden**. That is right.

Senator **Metzenbaum**. I see.

You just told us about the retaliation that apparently occurred concerning the San Francisco TV station. Do you know of any other similar situations? We just heard from Mr. Fritts about Rockford.

Mr. **Padden**. What I can tell you is on a weekly basis for the last couple of years, we have heard from local stations out there with serious problems with local cable operators. They call us up; they give us the details; and then they say: "But do not tell anybody. You have to be careful because right now there is no one to protect us, and we are afraid to complain because we are at the mercy of the cable operator."

It is a fear that spreads all across the country right now.

Senator **Metzenbaum**. I would be grateful if you would pass on the word. We would like to know. And if it is necessary that we treat that information confidentially, we will do so. But I am very much interested in getting the Antitrust Division of the Department of Justice into this area because I think it is a horrendous development.

Mr. **Padden**. We would be happy to work with your staff, Senator.

Senator **Metzenbaum**. Thank you.

Are local broadcast stations often required to surrender some of their advertising spots in order to be assured of carriage on cable systems?

Mr. **Padden**. Yes, Mr. Chairman. In our view, the basic tradeoff historically embodied between these two industries has been that the cable industry received a compulsory license free to carry local broadcast programming, but had the obligation to carry local broadcasters. Now, the free compulsory license remains for the benefit of the cable operator, but must-carry protection has gone for the local broadcaster. As a result, it is very common for cable operators to now seek to gain additional leverage over the local station by requiring them to surrender free advertising time to the local cable operator or provide cash payments or provide equipment to the cable operator. And in the FCC's survey, there were 320 admitted instances of cable operators demanding that kind of consideration.

Senator **Metzenbaum**. Do you think that vertical integration in the cable industry is good for TV viewers?

Mr. PADDEN. No, Mr. Chairman, I do not. And you do not have to take my word for it. On Page 16 of my testimony, you will see five different quotations lifted out of an antitrust suit that Ted Turner's CNN filed against a competitive entity seeking to start a competitive news service, in which Mr. Turner alleged—not me, Mr. Turner, and he is certainly an authority on the cable industry—that cable operators maintain a monopoly, that they control essential facilities; they use that monopoly to give an unfair advantage, a competitive advantage over other program services; that that created barriers to entry; and that cable television subscribers have been and continue to be adversely affected by these practices.

So I think we can rely on Mr. Turner.

Senator METZENBAUM. That was in 1983?

Mr. PADDEN. It was in 1984, the same year the Cable Act was passed, ironically.

Senator METZENBAUM. I do not know if Mr. Turner would testify the same way today in view of the fact that he is now more owned by the cable industry.

Mr. PADDEN. I am sure he has a different view today, but I am equally sure that he was telling the truth in 1984.

Senator METZENBAUM. Mr. Schmidt, it has been over a year since members of the Wireless Cable Association came before this subcommittee and testified about the problems you had in obtaining programming which you need to compete. I gather that that situation has not improved much except immediately prior to the time when a hearing is to be conducted in the Congress.

Mr. SCHMIDT. Mr. Chairman, without trying to be too cynical, I think that the bottom line is there needs to be Government pressure on this issue. Unfortunately, I agree with some earlier comments you made relative to the inefficiency of, say, the Justice Department and/or the FCC looking at some of these matters. I frankly think that if it was not for some of the things that you have done here in the Congress, and now recently some things that have taken place with State Attorney Generals, cable's monopoly is absolutely insurmountable.

But I am also an optimist by nature, and I believe that the public has finally gotten to the point where they are fed up with cable's monopoly practices. I think this fight was characterized as two private businesses, you know, fighting over market share. I think that the point has been lost, as I say, but for people like yourself who have brought it back into focus. It is a consumer issue. And I am convinced that programming is what people watch. If we have programming, we can provide consumers a choice.

Senator METZENBAUM. Am I correct in my understanding that your industry is prepared to pay the fair rate, desires no special economic advantages, and is willing to assure the provider of the programming that you have sufficient economic security that their bills will be paid, and that you ask for no advantages?

Mr. SCHMIDT. That is absolutely correct, sir.

Senator METZENBAUM. Is it true that even when wireless operators are able to secure cable programming they are sometimes prohibited from distributing to customers or potential customers who live in areas which are wired for cable?

Mr. SCHMIDT. Yes, the term that is used is red-lining, and what happens—this came up, again, going back to Mr. Mooney's list of all this wonderful programming we are supposedly receiving. If you go through and analyze that list, you will see that most of the premium programming, that little premium programming that is available, was secured through either litigation, settlement as a result of litigation, and then terms that have basically put significant pressure on us not to describe in detail those relationships.

I have had good news in the last few days where Showtime has made some agreements with some of our people. But in terms of some of our members, they said: I am not allowed to discuss this with anybody, so please do not tell the government that my company is receiving the product.

I think there is a concern on our part for issues of retribution. But I go back to the basic premise, and that is, if we are given an opportunity—we are not looking for an unfair advantage any place. This is deja vu for me. It is kind of where cable was when I entered the picture in 1975 on their behalf as president of NCTA. Now, the shoe is on the other foot. We want to have the opportunity to compete. The consumer needs a choice. They want a choice. They have absolutely bought the concept. They love cable television. But they do not want to have only one distributor from whom you can buy the product.

Senator METZENBAUM. Professor Ordover, in your testimony, you were extremely critical of the empirical basis for the FCC effective competition standard. But the cable industry defends the FCC's test, claiming that the three-signal standard was the only measurement of effective competition that was supported by empirical data. How do you respond to that claim?

Mr. ORDOVER. I think that what the FCC tried to do was to see whether market power would be reduced if a fourth station with adequate reception were to be available to the TV households. But that is not the question before us.

The question before us is whether even in the presence of three high quality reception over-the-air television signals, the cable programmers, the cable system operators could charge prices that were supra-competitive for the whole package of services which they were providing. That is what I saw: the so-called econometric evidence that we talked about did not provide any light on that particular issue.

As I have pointed out, the question is how much room there is for pricing above the competitive level. And the empirical evidence that we have in front of us and that we have been talking about today suggests there was a tremendous amount of flexibility that CSOs were able to exercise, whether or not there were three, four, or five television stations available.

I should say that some of the empirical work that my colleague, Professor Willig, performed at Princeton University suggests that there is very little relationship between the prices that CSO's charge and the number of the over-the-air television stations that are in a particular community. So that would point to the fact of the ineffectiveness of the constraint as opposed to the effectiveness of the constraint.

Senator **Metzenbaum**. Professor Ordover, in 1982, the Department of Justice promulgated merger guidelines. If you were to apply those guidelines to a local market with three broadcast signals and one cable system, would you conclude that there are competitive constraints on the cable operator's ability to raise rates?

Mr. **Ordover**. Well, the guidelines ask whether—in this case, one would have to look at a merger between a CSO and the network, and I do not think that is the question you are asking. The point that I was making in my testimony was that the guidelines would ask whether or not a particular firm could raise, after a merger, its rates by 10 or 15 percent over some particular period without losing a tremendous number of customers. The evidence suggests that cable systems were able to raise their prices by, on the average, 50 percent while increasing penetration in the communities which they serve.

So that would suggest that the cable system operators did not meet the guidelines test that would nullify a presumption of market power.

Senator **Metzenbaum**. Thank you very much.

I and other members of the committee may have additional questions for members of this panel, as well as the previous panels. If we do, those questions will be sent out to you, and we expect you to answer them. They will be included in the record.

This hearing stands adjourned.

[Whereupon, at 1:05 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

APPENDIX

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN
EDWARD M. KENNEDY, MASSACHUSETTS
HOWARD M. METZENBAUM, OHIO
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STROM THURMOND, SOUTH CAROLINA
ORRIN G. HATCH, UTAH
ALAN K. SIMPSON, WYOMING
CHARLES E. GRASSLEY, IOWA
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GORDON J. HUMPHREY, NEW HAMPSHIRE
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DIANA HUFFMAN, STAFF DIRECTOR
TERRY L. WOOTEN, MINORITY CHIEF COUNSEL
R.J. DUKE SHORT, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 6, 1989

Mr. Charles Rule
Assistant Attorney General
Department of Justice
Antitrust Division
10th and Pennsylvania Avenues
Room 3107
Washington, D.C. 20530

Dear Mr. Rule:

It has been publicly reported that Time, Inc., and Warner Communications are planning to merge to create a media conglomerate valued at $18 billion. I am writing you to express my serious concerns about the impact of the Time-Warner merger on competition and diversity in the communications industry and to urge you to undertake a careful and thorough review of this proposal.

Both these companies are among the leading media and entertainment companies in the world. Time publishes a number of magazines, including People, Time, Sports Illustrated, and Fortune. It owns two of the most popular and widely sought sources of premium cable programming, Home Box Office (HBO) and Cinemax. It also owns American Television and Communications Corp. (ATC), the second largest multi-system cable operator (MSO) in the nation. Warner Communications owns Warner Bros. movie and television studios, Warner Records, and another major television production company, Lorimar Telepictures Corp. Finally, Warner also owns Warner Cable Communications, the fifth largest chain of cable systems in the nation.

There are strong indications that a Time-Warner merger could substantially reduce competition and diversity in the communications and entertainment field, particularly in the cable television industry. Such a development is especially disturbing in light of a continuing trend toward further concentration and reduced possibilities for meaningful competition in cable television.

First, it is important to point out that cities are almost completely precluded from regulating cable television rates in this country. In 1984, Congress effectively precluded most local regulation on the theory that there would be increasing competition in cable television. Only six years ago, the President of the National Cable Television Association pressed for Congress to deregulate the cable industry, assuring us that: "A consumer will have a couple of choices of cable companies. There will be two cable wires running down the street."

This promise manifestly has failed to come true. There are over 8000 communities across the country served by cable systems. Less than one percent of those 8000 communities have a choice of cable companies. Cable is an unregulated monopoly throughout nearly the entire country. Indeed, Wall Street analysts have described the cable industry's revenue stream as "a monopolistic annuity."

Large MSOs like Tele-Communications Inc. (TCI), ATC and Warner have the capital and know-how to compete head-to-head. But the MSOs have spent the last few years buying up small cable systems and consolidating with one another in order to preserve and strengthen their local monopolies nationwide.

While the Time-Warner merger would not appear to raise substantial horizontal concentration concerns under standard Justice Department guidelines, those guidelines are clearly inadequate for a complete evaluation of this merger because the most important relevant product market is the (typically metropolitan area) local market for cable television. It is of little significance to the average consumer in a particular metropolitan area that this merger does not substantially raise national concentration levels in cable system operation. The fact is that if a consumer wants cable programming, he or she has only one source in all but a tiny handful of communities in this country.

Thus, I would urge you to examine the impact of this merger on the emergence of competition in the relevant geographic market: the local level. While head-to-head competition among cable systems is all but completely absent, competition from non-cable technologies such as multi-channel multi-point distribution systems (MMDS) -- or wireless cable -- is still a possibility. However, wireless cable operators report that the single biggest difficulty they have in competing with cable is gaining programming. And the single most important programming service to enable them to compete is highly popular premium programming such as HBO and Cinemax, both of which are owned by Time, Inc.

Time, Inc. has demonstrated an adamant refusal to make its programming available on fair terms -- or any terms at all -- to wireless operators that could potentially compete with its cable systems. Now, with the acquisition of the Warner Cable systems, there is an even greater incentive for Time to deny competing technologies its existing programming -- and the new programming which Time-Warner is expected to create.

The Time-Warner merger also will harm program diversity for consumers. Will Time-Warner cable systems only make HBO or Cinemax available to their subscribers? Will HBO have the exclusive cable rights to exhibit Warner films? Your investigation should pursue answers to these questions.

Local cable systems are a bottleneck distribution facility for programmers. This bottleneck enables large MSOs to demand substantial volume price discounts from cable programmers, which do not appear to be passed on to consumers. The merger of ATC and Warner reduces the bargaining power of independent programmers, by reducing the number of nationwide program distribution outlets. MSOs will have an even greater opportunity to engage in "take it or leave it" negotiating tactics with independent programmers. This leverage not only harms independent programming companies, particularly, small production companies trying to break into the market, it places small cable operators at disadvantage. A small cable system, or competing multi-channel system, simply cannot compete on even terms if a national MSO is able to get programming on consistently preferable terms.

The impact on new programming is likely to be even more significant for consumers than the harm caused by refusing to provide existing programming to competing technologies. There is widespread consensus that no new cable programming venture can survive without the go-ahead from large MSOs like TCI and Time-Warner. Both the New York Times and the Wall St. Journal have reported that cable operator ownership or equity participation is essential to the success of any new programming venture.

It is this ability to control both the conduit for programming (the cable wire) and the content of the programming (through MSO equity interest in programming ventures) that poses the greatest threat to consumers. The absence of competition in the delivery of cable programming means that consumers have no protection against unrestrained rate hikes. The de facto editorial control which MSOs can exercise over new programming threatens the diversity of information and entertainment sources available to cable viewers.

Both the broadcast television and the motion picture industries are subject to legal limits on their ability to exercise the kind of control over conduit and content which is now enjoyed by the cable industry. The limits on cross-ownership of both production and distribution facilities in the motion picture and television industries were imposed to ensure diversity in programming and in distribution outlets. They have worked to promote competition among the large networks and independent television stations and, thus, to promote greater diversity and choice for consumers.

An increasing trend toward vertical integration between cable systems and the production of programming can threaten the availability of high quality programming to any other distribution system, including the commercial networks. If the accelerated concentration and vertical integration in the cable industry continues to proceed unchecked, there will be increased pressure to remove the current limitations on commercial network ownership of programming.

Some persons may defend this proposed merger on the grounds that a larger and more diversified entertainment company is better prepared to compete internationally. The presence of foreign competition and the potential for improving American firms' competitive performance are, of course, important objectives and worthy of serious review. However, in this case, there would appear to be a heavy burden on the proponents of this merger in explaining why a merger which results in further vertical integration between the production of programming and the distribution of cable television is necessary for improved performance in international competition. Any review by the Department should pay particular attention to whether any actual increases in productive efficiency, if they are possible, may be achieved without further discouraging competition at the local consumer level.

The last administration will go down in history as having little regard for the antitrust laws and for protecting consumers from anticompetitive activities. I sincerely hope that, under a new administration, the antitrust agencies will be more aggressive in challenging unlawful mergers. The Time-Warner merger, which is the first major one to occur under this administration, presents an excellent opportunity for the Justice Department to renew the long-standing bipartisan tradition of vigorous antitrust enforcement. From President Teddy Roosevelt through President Gerald Ford, Republican administrations were noted for strong and vigorous support of the antitrust laws. I hope your administration will follow in that tradition.

I urge you to begin a prompt and thorough investigation of this proposed merger, with a particular focus on the steady trend toward harmful monopoly power by cable television at the local level.

Sincerely,

Howard M. Metzenbaum
Chairman
Antitrust, Monopolies and
Business Rights Subcommittee

HMM/ec

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS
HOWARD M. METZENBAUM, OHIO
DENNIS DeCONCINI, ARIZONA
PATRICK J. LEAHY, VERMONT
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HERBERT KOHL, WISCONSIN

STROM THURMOND, SOUTH CAROLINA
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MARK H. GITENSTEIN, CHIEF COUNSEL
DIANA HUFFMAN, STAFF DIRECTOR
TERRY L. WOOTEN, MINORITY CHIEF COUNSEL
R.J. DUKE SHORT, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 22, 1989

The Honorable Charles F. Rule
Assistant Attorney General
Department of Justice
Antitrust Division
10th and Constitution Avenues, NW
Room 3107
Washington, D.C. 20530

Dear Mr. Rule:

In our letter of March 6 regarding the merger between Time, Inc. and Warner Communications, we discussed the threat which this merger poses to competition and diversity in the cable-television industry. We specifically noted the incentives which the merged entity might have to withhold programming -- such as HBO, Cinemax and the new programming services which Time-Warner is expected to create -- from competing program delivery systems such as wireless cable. In addition, we asked you to consider the incentives which Time-Warner would have to keep competing programming services off its cable systems.

Time-Warner's ability and incentive to engage in such practices does not stem simply from its ownership of HBO and Cinemax. If this merger is approved, Time-Warner would not only have an estimated 17.5% share of Turner Broadcasting System (which currently runs Cable News Network, Turner Network Television, Headline News and WTBS), it also would have three seats on the Board of Directors of TBS. Time also has the right to take over Cable News Network (CNN) if Turner Broadcasting System is sold. The possibility of Time obtaining control of CNN raises the specter that an important information source might be unavailable to viewers who do not subscribe to Time-Warner cable systems.

Recent developments indicate Time-Warner's programming interests could expand if, as newspaper accounts suggest, Turner Broadcasting System acquires control of Financial News Network (FNN). If that acquisition takes place, Time-Warner's financial interests in FNN and CNN could reduce its incentive to carry new or competing news, information, and financial affairs programming on its cable systems.

For example, NBC will soon launch a new cable programming service -- Consumer News and Business Channel -- which is expected to provide programming similar to that found on FNN, and perhaps CNN as well. Since CNBC undoubtedly would compete with FNN and CNN for audience share and advertising dollars, Time-Warner might be disinclined to carry the competing service on its cable systems. This is not an idle possibility. In 1986, a group of cable consumers had to sue Time, Inc. to force its Manhattan cable system to carry a pay movie service other than HBO or Cinemax.

In short, I would hope that your investigation will account for the impact of this merger on the availability to competitors of the whole range of Time-Warner's existing program holdings -- HBO, Cinemax, Turner Broadcasting, Black Entertainment Television and other services -- as well as its potential future program services. In addition, I would urge that you make a full inquiry regarding whether Time-Warner's program holdings -- current and potential -- would discourage the merged entity from carrying competing unaffiliated programming services on its cable systems.

Sincerely,

Howard M. Metzenbaum
Chairman
Antitrust, Monopolies and
Business Rights Subcommittee

HMM/ch

National Cable Television Association

James P. Mooney
President &
Chief Executive Officer

1724 Massachusetts Avenue, Northwest
Washington, D.C. 20036
202 775-3655

April 24, 1989

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies
and Business Rights
U. S. Senate
Russell Senate Building
Room 140
Washington, D.C. 20515

Dear Mr. Chairman:

During the course of your April 12 hearing on the cable industry, several witnesses made statements or provided information which NCTA believes warrant further examination. In order to assist the subcommittee in properly assessing the statements made during the hearing, the following are the facts, as we understand them, underlying several statements made by these witnesses.

The Carriage of SportsChannel by MetroTEN (MMDS system serving Cleveland, OH)

During the course of his oral statement, Wireless Cable Association (WCA) President Robert Schmidt claimed that NCTA, in our written testimony, had presented "totally false" information by stating that the MMDS system in Cleveland, MetroTEN, currently carries SportsChannel America programming service (now included in SportsChannel Ohio).

Subsequent to the hearings, however, members of the trade press verified that MetroTEN is indeed carrying SportsChannel, and that MetroTEN's customer service representatives are informing potential customers that this network is available. Even MetroTEN President James Theroux has confirmed that his system is in fact carrying SportsChannel.

Yet, despite independent verification, WCA has continued to contend that MetroTEN cannot obtain the carriage rights to SportsChannel. At the same time, WCA contends that MetroTEN cannot acquire SportsChannel on "fair" terms. In a letter to subcommittee counsel Chris Harvie, MetroTEN itself claims that it carries SportsChannel on a trial basis and that the terms proposed by SportsChannel to allow MetroTEN to carry the channel after the trial period are totally "unacceptable" to MetroTEN. However, we understand from SportsChannel that the carriage terms and condition offered to MetroTEN are exactly the same as those offered and accepted by several cable systems in the Cleveland area. Further, SportsChannel has indicated that it will continue to discuss various contractual options with MetroTEN.

The basic point I would like to emphasize, however, is that whatever dispute may exist about the terms under which MetroTEN is carrying SportsChannel, Mr. Schmidt was not correct in stating, as he did before your subcommittee, that our testimony was "totally false." MetroTEN does, in fact, carry SportsChannel, as we reported in our statement.

The Repositioning of Four Rockford, IL Broadcast Stations By Jones Intercable's Janesville, WI Cable System

National Association of Broadcasters (NAB) President Eddie Fritts stated during his testimony that the four broadcast stations licensed to serve Rockford, IL (WREX, an ABC affiliate; WIFR, a CBS affiliate; WTVO, an NBC affiliate; and WQRF, an independent station) had been repositioned to cable channels 39 through 42 by a local cable system. Mr. Fritts further stated that as a result of these changes, cable subscribers to this system are required to pay an additional $2 per month for a converter in order to view these stations. Although Mr. Fritts did not mention the system by name during his testimony, he later stated that the system involved is Jones Intercable located in Janesville, WI.

Although Jones Intercable did reposition the four Rockford stations to cable channels 39 through 42, it is not true that subscribers, in order to receive these channels, are required to pay an additional $2 per month for a converter. Subscribers to the Janesville system who require converters can exchange free-of-charge their old cable converters (which could receive only up to cable channel 36) for new converters (which have remote control capabilities, and can be used to receive up to cable channel 43). As part of an upgrade being made by the system, Janesville subscribers who require converters can now, if they choose, rent a remote control for their converters for $2 per month, although cable channels 39-42 can be viewed without the use of a remote control. This monthly $2 remote control rental fee might be the source of Mr. Fritts' confusion.

Further, the Janesville system carries an additional five local broadcast stations from Madison, WI (WISC, a CBS affiliate; WMTV, an NBC affiliate; WKOW, an ABC affiliate; WMSN, an independent station; and WHA, an educational station). Both Madison and Rockford are located approximately thirty miles from the Janesville system. The Madison stations have not been repositioned, and all are carried on the lower channel numbers of the cable system even though some of the FCC assigned channel number of these stations are quite high (e.g., channel 47 is carried on channel 10 of the cable system). This placement reflects the television viewing preference of the Janesville cable subscribers as revealed in a survey performed for the cable system by Quantel Research; viewer preference for the Madison stations in Janesville is quite high, but quite low for the Rockford stations.

Not referenced by Mr. Fritts in his testimony is the fact that the four Rockford stations do continue to enjoy widespread carriage on Wisconsin and Illinois cable systems despite the absence of must carry regulations. According to A. C. Nielsen data, WIFR and WREX are currently carried on 51 cable systems. Likewise, WTVO enjoys carriage on 49 cable systems and WQRF is currently carried by 40 systems.

The Repositioning of San Francisco Independent KBHK by TCI's Pacifica, CA Cable System

During the course of his testimony, the President of the Association of Independent Television Stations (INTV), Preston Padden, urged Congress to introduce legislation that would prevent cable systems from repositioning local broadcast stations. To demonstrate the need for such legislation, Mr. Padden stated that KBHK (channel 44), an independent station licensed to serve San Francisco, CA, had been repositioned twice during the past two years by a TCI system in the San Francisco area.

Although Mr. Padden did not specify which system was involved, TCI's system in Pacifica did reposition on April 1 KBHK from cable channel 22, where the station had been placed in January 1986, to cable channel 44, the station's off-air number. The repositioning of KBHK by TCI's Pacifica system was a result of TCI's corporate policy to carry a broadcast station "on channel" (i.e., on its FCC assigned channel), whenever technically possible. Because the Pacifica system completed a system rebuild in 1988, the system is now able for the first time to place channel 44 on its off-air number.

Mr. Padden further suggested that because KBHK was moved to a higher channel number, many of the system's subscribers cannot receive the station. However, TCI has and will continue to inform all of its subscribers that those who need new channel converters in order to receive the system's expanded number of channels may exchange their current converters for new converters free-of-charge. In any event, such a channel converter for the first television set in a household is available at no charge in TCI systems.

Moreover, as is true of the Rockford, IL stations, KBHK has continued to enjoy wide cable carriage in the absence of must carry rules. According to A. C. Nielsen data, KBHK is currently carried on a total of 103 cable systems which serve 1.6 million subscribers. Further, in each carriage instance, KBHK is, according to Nielsen, carried on or below the station's off-air channel number.

I appreciate the opportunity to provide you with this additional information, and request that this letter be made part of the record of the hearing. If I can be of further assistance, please let me know.

With best wishes,

Sincerely,

James P. Mooney

JPM:omg

cc: The Honorable Dennis DeConcini
The Honorable Orrin G. Hatch
The Honorable Howell T. Heflin
The Honorable Gordon J. Humphrey
The Honorable Herbert Kohl
The Honorable Paul Simon
The Honorable Arlen Specter
The Honorable Strom Thurmond
The Honorable Edward J. Markey
The Honorable Matthew J. Rinaldo

National Association of
NAB
BROADCASTERS

Edward O. Fritts

President & CEO
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5444
Telex: 350-085

May 16, 1989

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies & Business Rights
308 Senate Hart Office Building
Washington, DC 20510

Dear Mr. Chairman:

I understand that you have received a letter from James P. Mooney, President and CEO of the National Cable Television Association, which addresses issues raised during the Antitrust Subcommittee's April 12 hearing on cable issues. Among the points Mr. Mooney discussed in that letter were my remarks on the repositioning of stations on the Janesville, Wisconsin cable system. My testimony in that instance was based upon a letter I had received the previous day from one of the repositioned Rockford, Illinois stations. In turn, I would like to provide you with my reactions to Mr. Mooney's letter.

In response to a question from the chair, I indicated that the cable system had repositioned Rockford television stations to channels (37-42) that would require new cable converters to permit their viewing, and that these new converters were not available to consumers, except at an additional charge of $2 per month.

Actually, they were not available because the cable system had depleted its inventory of standard converters that were capable of receiving channels 37 through 42. This was acknowledged by the manager of the Janesville cable system in an interview with Broadcasting magazine following the hearing. It is my understanding, however, that remote control converters capable of receiving these channels still were available, at an additional $2 charge per month.

As I now understand the situation, the new standard (non-remote control) converter is available to Janesville subscribers for no additional charge. The new remote control converter is available for an additional $2 per month charge. However, Mr. Mooney neglected to add that this pricing scheme apparently applies only to the first set in the home. The cable system in many cases does impose additional monthly charges for the converters needed for other sets in subscribers' homes that are connected to cable.

As a result, subscribers in Janesville who decline to obtain additional new converters for those sets apparently will be unable to receive signals on channels 37 through 42 on those sets, which is where the Rockford television stations were repositioned. (You should note that 66% of the nation's television households have two or more television sets.)

Such channel positioning changes have a significant impact on the broadcast markets involved. A cable system does not merely affect what its subscribers may view when it repositions broadcast stations. Because carriage and positioning decisions can have such a substantial impact upon the economic health of television stations, a system's positioning decisions will ripple throughout the stations' entire viewing area.

This instance in Janesville, and similar instances across the country, illustrate one facet of the present power that deregulation has bestowed upon cable. Monopoly cable systems currently have unchecked say not only over the decision to carry or not to carry local broadcast signals. They also have total discretion over where the stations they do carry will be positioned, how frequently these stations will be relocated, and so forth. As your hearing demonstrated, such decisions increasingly are being made by vertically and horizontally integrated companies that have incentives to favor programming services in which they have economic interests to the detriment of local broadcast services.

To reiterate my testimony, cable should not have this total power over the local video marketplace. Congress should return an essential element of fair competition by imposing reasonable must carry and channel positioning rules on the cable industry.

Thank you for providing me with the opportunity to expand upon the points raised in the hearing. On behalf of NAB, I commend your continued interest in these vital competitive issues, and I look forward to working closely with you and the Subcommittee as you move forward.

Kindest regards,

Edward O. Fritts

WREX 13 TV
Rockford, Illinois

WREX-TV

P.O. BOX 530 • ROCKFORD, ILLINOIS 61105 • 815/968-1813
FAX: 815-335-2055

April 10, 1989

Mr. Eddie Fritts,President
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036-2891

Dear Eddie,

I see that you are calling for re-regulation of cable and will speak to that issue on Wednesday April 12 before the Senate anti-trust subcommittee.

[illegible] concern is Rockford, Illinois' treatment by the Janesville, Wisconsin cable system owned by Jones Intercable. The attached page lists channel locations before March 1987, March 1987-March 1989, and the most recent positions effective April 2, 1989.

These changes in 1987 resulted in the loss of Rock County, Wisconsin from the Rockford DMA to the Madison DMA and a resulting loss of revenue to Rockford. A check with Madison will show that revenues in Madison did not increase accordingly.

Note the positioning of cable revenue generating satellite services in the lower tier sandwiched between over-the-air broadcasters. Because of the antiquated Janesville system approximately 15% of their subscribers cannot even receive the Rockford network affiliated stations.

In late 1988 in a discussion with the system manager, another manager and I were told that they would make another change in 1989 and it would be possible that the Rockford stations could be 'clustered' at channel locations 13-16.

The third channel card of course shows the results; Rockford stations are now on channels 39-42. All existing decoder boxes receive only 36 channels and to receive the upper channels subscribers must replace their decoders with new remote control decoder boxes at a cost of $2 per month per decoder box. Jones says that they have a limited number of non-remote control decoders at no additional cost but they ran out of them a week ago and have a waiting list. These limited boxes are only available for one set per home.

Subscribers may keep their existing 36 channel decoders but will not be able to receive C-Span, Home Shopping Network, WREX-TV, WIFR-TV, WTVO-TV, and WQRF-TV in Rockford anymore.

April 10, 1989

Mr. Eddie Fritts:

Simple arithmetic will show that 26,000 subscribers at a$2-per-home minimum per month would generate over $600,000 per year in revenue.

It is appropriate to note that Janesville, Wisconsin is 28 miles from Rockford; 61 miles from Milwaukee; 30 miles from Madison. Because their channel shifting has cost Rockford, Illinois Rock County as a part of our market, any new exclusivity rule based on ADI's or DMA's instead of signal contours or miles will not alleviate current situations. I'm sure that this 'classic' case is being duplicated on other cable systems throughout America. A survey of Jones Intercable cities might prove interesting!

Individual station information may be derived from:

Mr. James Grimes, G.M.
WIFR-TV, Ch.23
2300 N. Meridian Rd.
Rockford, Il. 61103
Phone: 815-987-5300
Fax: 815-965-0981

Mr. Hal Froelich, G.M.
WTVO-TV, Ch.17
1900 N. Meridian Rd.
Rockford, Il. 61103
Phone: 815-963-5413
Fax: 815-963-0201

Mr. Robb Gray, G.M.
WQRF-TV, Ch.39
401 S. Main Street
Rockford, Il. 61101
Phone: 815-987-3950
Fax: 815-964-9974

Regards,

Ray J Chumley

Ray J. Chumley
General Manager

Enc.

RJC:jf

April 10, 1989

PRIOR TO MARCH 1987

JONES INTERCABLE, INC.

JANESVILLE/MILTON/
EVANSVILLE/EDGERTON/CLINTON
CHANNEL GUIDE

FOR INFORMA[illegible]N
754-2881
FOR SERVICE/REPAIR
754-2778
1-800-652-9456

OCD (1986) [illegible]

Cable Channel Service

2 The Learning Channel/Local Origination
3 WISC (ch. 3) CBS Madison
4 WTMJ (ch. 4) NBC Milwaukee
5 WMTV (ch. 15) NBC Madison
6 CABLE NEWS NETWORK
7 WVTV (ch. 18) IND Milwaukee
8 WIFR (ch. 23) CBS Rockford
9 WGN (ch. 9) IND Chicago
10 ~~WHA (ch. 21) PBS Madison~~ Sky Merchant
11 WTVO (ch. 17) NBC Rockford
12 WKOW (ch. 27) ABC Madison
13 WREX (ch. 13) ABC Rockford
14 CBN/Family
15 ESPN
16 NICKELODEON
17 WTBS (ch. 17) IND Atlanta
18 ~~Not Available~~ WHA-21
19 MTV (Music Television)
20 Arts and Entertainment
21 **HOME BOX OFFICE**
22 **THE MOVIE CHANNEL**
23 **SHOWTIME**
24 Janesville Public Schools
25 **THE DISNEY CHANNEL**
26 Janesville Public Schools
27 **WORF (ch. 39) IND Rockford**
28 THE NASHVILLE NETWORK
29 Not Available
30 USA NETWORK
31 The Weather Channel
32 Not Available
33 CNN HEADLINE NEWS

MARCH 1987 - MARCH 1989

JONES INTERCABLE, INC.

JANESVILLE/MILTON/
EVANSVILLE/EDGERTON/CLINTON
CHANNEL GUIDE

FOR INFORMATION
754-6799
FOR SERVICE/REPAIR
754-2778
1-800-652-9466

Cable Channel Service

2 The Learning Channel/ Local Programing/MC2
3 WISC (ch. 3) CBS-Madison*
4 The Nashville Network
5 WMTV (ch. 15) NBC-Madison*
6 Cable News Network (CNN)
7 WKOW (ch. 27) ABC-Madison
8 The USA Network
9 WGN (ch. 9) Independent-Chicago
10 Sky Merchant
11 WHA (ch. 21) PBS-Madison
12 ESPN
13 ~~WORF (ch. 39) Independent-Rockford~~ *
14 CINEMAX*
15 American Movie Classics
16 Nickelodeon
17 WTBS (ch. 17) Independent-Atlanta
18 WREX (ch. 13) ~~ABC-Rockford~~
19 Music Television (MTV)
The Arts and Entertainment Network
HBO*
22 THE MOVIE CHANNEL*
23 SHOWTIME*
24 WVTV (ch. 18) Independent-Milwaukee
25 THE DISNEY CHANNEL
26 The Discovery Channel
27 WIFR (ch. 23) CBS-Rockford
28 CBN Cable Network
29 WTMJ (ch. 4) NBC-Milwaukee*
30 ~~WTVO (ch. 17) NBC-Rockford~~
31 The Weather Channel
33 CNN Headline News

*Stereo Broadcast

EFFECTIVE APRIL 2, 1989

JONES INTERCABLE, INC.

JANESVILLE/AFTON/MILTON
CHANNEL GUIDE

FOR INFORMATION
754-6799
1-800-652-9466
FOR SERVICE/REPAIR
754-2778
1-800-[illegible]

Cable Channel Service

2 HBO*
3 WISC (ch. 3) CBS-Madison*
4 THE NASHVILLE NETWORK*
5 WMTV (ch. 15) NBC-Madison*
6 CABLE NEWS NETWORK (CNN)
7 WKOW (ch. 27) ABC-Madison
8 TURNER NETWORK TELEVISION (TNT)
9 WGN (ch. 9) IND Chicago
10 WMSN (ch. 47) IND Madison*
11 WHA (ch. 21) PBS Madison
12 ESPN
13 MIND EXTENSION UNIVERSITY
14 CINEMAX*
15 DISNEY
16 SHOWTIME*
17 WTBS (ch. 17) IND Atlanta
18 WVTV (ch. 18) IND Milwaukee
19 WHAT'S ON REQUEST
20 LOCAL PROGRAMMING
21 ARTS & ENTERTAINMENT (A & E)
22 NICKELODEON
23 THE MOVIE CHANNEL*
24 CNN HEADLINE NEWS
25 LIFETIME
26 THE DISCOVERY CHANNEL
27 THE LEARNING CHANNEL/(RESERVED)
28 CBN FAMILY CHANNEL
29 WTMJ (ch. 4) NBC Milwaukee*
30 VIDEO HITS ONE (VH-1)*
31 THE WEATHER CHANNEL
32 JANESVILLE PUBLIC SCHOOLS
33 FINANCIAL NEWS
34 MUSIC TELEVISION (MTV)
35 VISN/EWTN
36 AMERICAN MOVIE CLASSICS
37 HOME SHOPPING CLUB
38 C-SPAN
39 WORF (ch. 39) IND Rockford
~~40 WREX (ch. 13) ABC Rockford~~
~~41 WIFR (ch. 23) CBS Rockford~~
~~42 WTVO (ch. 17) NBC Rockford~~
48 REQUEST TELEVISION (SPECIAL CONVERTER REQUIRED)

*Stereo Broadcast EFFECTIVE 4/2/89

Independent
Television

April 27, 1989

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies
  and Business Rights
Committee on the Judiciary
United States Senate
140 Russell Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I feel compelled to write in response to Jim Mooney's April 24 letter to you. Mr. Mooney seeks to characterize channel shifts of KBHK as merely "on channel", but as demonstrated by explanations below, these shifts are severe anticompetitive extensions of cable's monopoly power.

Millbrae

Not mentioned in Mr. Mocney's letter but part of the full story is TCI's move of KBHK earlier this year. On January 27, 1989, TCI's Millbrae, California cable system moved KBHK from its long held channel 13 position to channel 22. TCI replaced KBHK with a cable program network in which TCI owns a significant equity interest. Additionally, TCI derives advertising revenue from the sale of local advertising time in this cable program network in direct competition with KBHK. The channel shift occurred three days before the very important February Nielsen and Arbitron rating sweeps.

TCI did not move KBHK to its "on channel" designation which TCI so often asserts as a rationale for its truly anticompetitive intent.

TCI does not separately break out a charge for the converter box it leases subscribers for their first TV set. TCI does charge for converter boxes for subscribers' second, third and other TV sets. When a TCI installer comes to a home he disconnects the antenna to all TV sets and hooks up all sets to TCI's system. If the subscriber chooses not to pay for additional converter boxes and if his/her second, third, etc. sets are not "cable ready", then he/she will most likely not be able to receive channels higher than channel 13 on the cable system. By shifting

INTV Association of Independent Television Stations, Inc.
1200 Eighteenth St., N.W., Suite 502, Washington, D.C. 20036 • (202) 887-1970/Fax (202)887-0950

KBHK from channel 13 to channel 22, KBHK can no longer be viewed on many of these second, third, etc. TV sets unless the subscriber now pays TCI an additional fee for converter boxes.

This represents a classic bait and switch. KBHK is significantly more popular than any cable program network. Therefore, to attract (bait) consumers in the first place to cable, TCI offered KBHK at one price. Then once the market is penetrated to a certain degree, TCI shifts (switches) the channels so that the subscriber now has to pay more (to rent additional converters) to get what he/she originally received for free. All the while TCI is disadvantaging a direct competitor and enhancing its own program channel.

KBHK engaged a nationally recognized research firm to conduct a survey of the Millbrae cable households. The result of the survey revealed that by moving KBHK from channel 13 to 22 20% of the households with second sets who could receive KBHK before the move can no longer receive KBHK on the second, third, etc. sets unless they pay TCI an added fee.

Pacifica

On April 10, 1989, TCI's Pacifica system shifted KBHK from channel 22 to channel 44. Mr. Mooney neglects to point out that this was the second shift of KBHK on this system in a 24 month period. Two years ago TCI Pacifica shifted KBHK from channel 12 to channel 22. You will note this was not "on channel" and raises the second set converter box issue mentioned above. Interestingly enough also, after the April 10, 1989 move, channel 22 remains black.

The latest move to channel 44 is almost as bad as if TCI had dropped KBHK from its system. As Mr. Mooney's letter points out, even existing cable subscribers who received TCI's "free" first set, converter box cannot receive KBHK unless they disconnect their old box and bring it down to the TCI office for a new one. The old TCI box only goes up to channel 30, making it impossible to view KBHK at its new channel 44 position. Since channel 22 remains black, one must wonder why TCI undertook this action against KBHK. One might argue it was because KBHK's President, John Siegel, testified before your subcommittee last year and exposed these TCI abuses.

I am very concerned with the cable industry's contention that it has a God-given right to move channels that compete with them at will. Taken to its logical extreme, if TCI is free to move KBHK or any free broadcaster every two years, it is free to move it every two minutes. As cable has grown to a powerful competitor of local stations for viewers and advertising revenues, the incentive for cable to use their monopoly power over the cable conduit to disadvantage competitors grows. Because cable's exercise of monopoly power is contrary to viewer preference for the local stations, these actions are anticonsumer and anticompetitive and government intervention is needed.

In closing, let me restate that the effect of these actions on consumers, and on distorting the communications marketplace, is of profound interest to our Association. It is this anticonsumer effect that merits your Subcommittee's continued oversight of the operations of the cable TV industry and of the abusive practices of certain cable operators, especially given the weakened power of local franchising authorities.

Thank you for your continuing interest in this matter. We will provide whatever assistance we can.

Best regards,

Preston Padden

Preston R. Padden
President

PRP:g

cc: Christopher Harvie

WIRELESS CABLE ASSOCIATION, INC.
2000 L Street, NW * Suite 702 * Washington, DC 20036 *
(202) 452-7823 * Fax (202) 223-1288 *

May 2, 1989

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies
and Business Rights
Senate Committee on the Judiciary
308 Hart Senate Office Building
Washington, DC 20510

Dear Senator:

NCTA President James P. Mooney's April 4 letter to you is a welcome attempt to set the record straight. Only if all the facts are known will solutions to the problems affecting the wireless cable industry be possible.

While Mr. Mooney's continued attention to Cleveland's MetroTEN is gratifying, his recent letter, like his earlier testimony, obscures one essential point: MetroTen still does not have an executed contract to carry SportsChannel Ohio. I am pleased to report, however, that last Friday, April 28, 1989, after Mr. Mooney wrote to you, the parties signed a letter of intent, so at last they do appear close to executing their first contract.

The particulars of MetroTEN's ongoing negotiations are really beside the point, however. Overall, the NCTA's testimony before the Subcommittee was artfully crafted to create the impression that the wireless cable industry has no problem in obtaining fairly-priced programming. We only wish that were the case.

NCTA's written statement included a chart (following page 79) which lists the programming that is supposedly available to various MMDS operators. This chart encourages the misperception that programming is generally available to wireless cable operators on fair terms under executed contracts. In many instances, this unfortunately is simply not the case. NCTA's chart is a good example of big cable's attempt to view the world through rose-colored glasses, and have the Subcommittee believe that programming is ours for the asking. The real situation is very different indeed.

Contrary to the illusion the NCTA testimony attempts to create, the programming so essential to attracting subscribers still is not generally available to wireless cable. For example:

- Even NCTA concedes that several popular programs -- Cinemax, TNT, the Weather Channel -- are not carried by any wireless cable system.
- HBO has voluntarily executed contracts with only one non-cable affiliated wireless cable operator, the Microband Corporation, which operates wireless cable systems in New York, Detroit and Washington, DC (Apparently MetroTEN and HBO have finally come to terms but have not yet executed a contract).
- MetroTEN obtained Showtime only as a result of litigation.
- People's Choice TV of Milwaukee, which is listed on the NCTA chart as carrying both HBO and Showtime, is in fact owned by Warner Communications; that cable connection apparently has resulted in enhanced access to programming.
- Nor do the other People's Choice operations listed by the NCTA have contracts to carry on multichannel MMDS most of the programming listed by the NCTA on its chart. The details are provided in the attached two letters from People's Choice TV.
- ESPN entered into an agreement with MetroTEN only after being threatened with litigation, and even then restricted areas in which the programming could be shown.

Moreover, as NCTA itself admits in a note to its chart, "not all networks are carried in all locations within the [wireless cable] systems' service areas." In plain English, this fine print means that wireless cable systems are all too often "redlined" by programmers. These programmers will sell to wireless cable, but only on the condition that the programming not be carried in any area that is wired for cable.

Such restrictions are in most instances accompanied by an onerous "confidentiality" provision which precludes the wireless cable operator from even acknowledging that redlining is taking place. In addition, since the hearing we have learned that two wireless operators have ben offered some arrangement to carry Showtime on the condition that they not discuss its terms with anyone. Our members have no practical alternative if they wish to obtain programming at all. We would encourage the Subcommittee to use its investigative powers to determine fully the extent to which programmers restrict carriage to unwired areas and the effect of this practice on competition within the subscription television industry.

Wireless cable, thanks in large part to your interest in these issues, has made great strides in the past year. But the industry still has many obstacles to overcome before it is able to carry, on the same terms and conditions as cable operators, the satellite television programming desired by consumers. The attached correspondence from People's Choice TV provides a good example of the continuing difficulties in obtaining programming experienced by wireless cable, private cable, TVRO and others who seek programming in order to compete with cable.

My purpose in offering this additional information is not to spar with the NCTA, but rather to demonstrate that although our industry stands willing and able to do business we do not yet enjoy the access to fairly priced programming that big cable would lead you to believe. On behalf of the industry, I thank you again for your leadership and welcome any assistance the Subcommittee can provide.

Sincerely,

Robert L. Schmidt

Robert L. Schmidt

cc: Mr. James P. Mooney
The Honorable Dennis DeConcini
The Honorable Orrin Hatch
The Honorable Howell Heflin
The Honorable Gordon Humphrey
The Honorable Herbert Kohl
The Honorable Paul Simon
The Honorable Arlen Specter
The Honorable Strom Thurmond

PCTV

[illegible]

[illegible]

April 20, 1989

Mr. Robert Schmidt
President
Wireless Cable Association, Inc.
2000 L Street, N.W.
Suite 702
Washington, D.C. 20036

Dear Bob:

You have asked me to give you corrected information on PCTV's programming status. I have reviewed the sheets circulated at the Senate hearings last week, and it has several errors. Here are my comments:

American Movie Classics

PCTV of Milwaukee is not our company. It is, in actuality, Warner Cable, who have the rights to the name in that market. Their programming rights there, in my opinion, are probably secured by virtue of the fact that they are a major cable operator. We, in fact, have no programming rights related to Milwaukee. We are in negotiation with AMC for other areas.

Arts and Entertainment

We have requested the service from them and been unable, as yet, to obtain it.

CBN Family Channel

We have a contract for this service nationwide.

CNN and CNN Headline

We have a contract for this service nationwide.

Cinemax

We are unable to obtain this service.

Discovery Channel

They have told us they will sign a nationwide contract.

Disney Channel

We have no rights for this service. We have been told that they are "testing with other operators", and invite us to "submit a proposal". Were we cable operators, no "proposals" would be necessary.

ESPN

We have no rights to this service. They have explicitly refused to grant us access to it via microwave.

HBO

We have the right to carry this service in Minneapolis only due to a grandfathered MDS contract. HBO has indicated they will not make this service available to us in other markets at this time.

Home Sports Entertainment

We have requested this service and it is unavailable to us.

The Learning Channel

We have a national contract for this service.

Lifetime

Lifetime is available to us at 16 cents per subscriber per month versus 10 cents to a cable operator.

MTV

PCTV has a national contract for this service.

The Nashville Network

PCTV has a national contract for this service.

Nickelodeon

PCTV has a national contract for this service.

Playboy Channel

Again, the mention of the Milwaukee system here is a reference to Warner Cable.

Showtime

PCTV does not have microwave rights to this service anywhere. We have been told by Showtime that it is not available to us on microwave.

Sports Channel America

We have requested a contract from them and are currently in negotiation as to terms.

Starion Premiere Cinema

We have a national contract for this service.

Super Station TBS

We have a national contract for this service.

The Movie Channel

PCTV does not have rights to this service anywhere contrary to what the information says. The status on this is identical to that of Showtime.

USA Network

PCTV has a national contract for this service, at 35 cents per subscriber per month versus 18 cents for cable operators.

VH-1

PCTV has a national contract for this service.

WGN

PCTV has a national contract for this service.

WWOR

National contract.

Overall, it should be noted that while many basic programming services are available to PCTV, the three most valuable channels to us are still being held back. These are: ESPN, HBO and Showtime. The jargon these companies use about dealing with wireless operators on a "case by case basis" is really a euphemism for delays and refusals.

Bob, please let me know if you require any further information.

Very truly yours,

Matt Oristano

Matthew Oristano
President, Omni
Microwave Television
General Partner

April 20, 1989

Mr. Robert Schmidt
President
Wireless Cable Association, Inc.
2000 L Street, N.W.
Suite 702
Washington, D.C. 20036

Dear Bob:

I am writing to give you information I have recently received regarding the "availability" of HBO to the wireless cable industry.

Last Wednesday morning before the Senate Anti-Trust hearings on cable television competitiveness, I met with a representative of HBO. The representative told me that this service was still generally unavailable on standard terms and conditions to the wireless cable industry. He further explained to me that the only way HBO could allow this service to be carried on microwave would be if the franchised cable operator in an area were to allow us to carry the signal. As you are well aware, there is virtually no likelihood that any franchised operator would allow us to carry HBO in direct competition with themselves.

Later that night, we watched the Senate hearings and saw Gerald Levin, Vice Chairman of HBO, proudly proclaim that HBO had signed an agreement with MetroTen in Cleveland for carriage of the HBO signal. Mr. Levin also indicated that Metro Ten had met HBO's "specifications" for worthiness in carrying the signal on microwave.

The next day, I called the HBO representative who I had previously met with. He said that he was aware of Mr. Levin's testimony and that he would immediately contact his superiors to find out what the conditions were that MetroTen had met, and on what basis an HBO licensing agreement would be available to us, now that this revelation had been made by Mr. Levin. Later, the HBO representative called me back to say that he had been informed by his superiors that the condition met by MetroTen was that they had a cable television franchise. In other words, MetroTen has obtained HBO because they are a cable operator, and without a cable franchise, HBO continues to be generally unavailable to the wireless cable industry.

Bob, I'm puzzled by this response and what it means in our industry's continuing struggle to get this very important programming. Can you please tell me, was Gerald Levin's testimony correct or not? I await your response.

Very truly yours,

Matt Oristano

Matthew Oristano
President, Omni
Microwave Television
General Partner

STATEMENT OF
JACK VALENTI

PRESIDENT AND CHIEF EXECUTIVE OFFICER

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

SUBMITTED TO THE

SUBCOMMITTEE ON ANTITRUST OF THE JUDICIARY COMMITTEE

UNITED STATES SENATE

ON THE SUBJECT OF

COMPETITION TO CABLE TELEVISION

MAY 5, 1989

Mr. Chairman, members of the Subcommittee:

I am pleased to have the opportunity to share with you my thoughts and concerns on competition to cable television, and am sorry that conflicting responsibilities made it impossible for me to attend your hearing on this important issue.

The member companies of MPAA are producers and distributors of motion picture and television programming. We have one overriding interest: to reach efficiently those consumers who want to see our works. We believe that a competitive video delivery marketplace enhances consumer and producer welfare because it permits us to better supply the programming that meets consumer demand, and to encourage the growth of that demand.

The crux of my message is one with which I know this Subcommittee will heartily agree: competition is good for consumers, lack of competition is bad for consumers.

Where competition is lacking, monopoly -- with all its attendant evils -- will result.

Specifically, this Subcommittee must consider whether cable television service in the United States lacks competition and, if so, what can and should be done to attack such an unacceptable state of affairs.

To my mind, there can be no question that cable lacks effective competition in the United States.

The cable operator is the classic bottleneck. The consumer has access only to those program services that the cable operator chooses to place on his menu. And the menu (i.e., the number of available channels) consists solely of those program services that the cable operator chooses to provide.

Thus, the cable operator totally controls the flow of programming from producer to consumer. Neither consumer nor producer has a competitive means of broadband video delivery (e.g., a second wire) to which to turn. And a producer has no means of reaching a consumer if the cable operator denies access, whatever the reason.

The current bottleneck situation denies the consumer access to the greatest possible diversity of video services, and the full benefit of economic competition between service providers. The producer (or the "programmer" who assembles programming into a "program service") is beholden to the whim and caprice of the bottleneck cable operator in his effort to reach the consumer; that can mean no access to consumers at all, or access only upon draconian terms and conditions dictated by the cable operator.

There is copious and persuasive evidence on the public record -- placed there by my association, by the broadcasting industry, by state and municipal organizations, by consumer groups, by cable's would-be competitors, and by many others -- that cable lacks truly effective competition. Cable's protestations to the contrary strain credulity to its breaking point.

Is it possible that so many diverse voices chanting concerns about cable could all be wrong? Surely not.

What is it that cable has done to warrant such near-universal concern and outrage?

** Cable operators are positioned to give favorable carriage to program services in which they own an equity interest, and they can and do deny carriage to competing program services. Just two recent examples:

1. The decision by Jones Intercable, one of the top ten cable MSOs, to drop USA Network (a non-cable-owned, general interest service, and one of the leading basic cable services in terms of subscribership) in favor of Turner Network Television (a competing service in which Jones has a financial interest);

2. The decision by Cablevision, a major cable MSO serving much of Long Island and the tri-state area, to drop Madison Square Garden Network (a non-cable-owned, sports-oriented service) in favor of its own SportsChannel service.

When carriage of independent program services is denied or subject to unfair conditions and restrictions, both consumers and independent programmers are robbed.

** Cable operators try to lock out all competition. They have a million and one excuses for denying programming to competing technologies such as wireless cable... even in those instances where the program service would have no other way to reach a TV home in a local market (e.g., where there is no local cable service). Exclusivity has its place in the programming market. Indeed, MPAA members strongly support the right to enter into exclusive licensing agreements in competitive markets, but not when it has the effect of foreclosing competitive outlets from the market.

There are other problems with cable as well, and there are others more directly affected by those problems who will no doubt speak to them. But they and we all speak with one voice: cable lacks competition, and something must be done about it.

But what? That's where the harmony of voices raised against cable may lapse into cacophony.

I wish to offer this Subcommittee some ideas about what can be done -- and several comments about what ought not be done -- to further the consumer's interest in competitive video services.

What Not To Do

1. Congress Should Not Reimpose Rate Regulation

Some urge that the only answer to the cable problem is to reimpose the stiff and heavy regulation that kept the cable industry in handmaiden status for many decades.

I cannot support that. There is a role for certain structural regulations in response to the cable problem, but rate regulation would, in my view, be short-sighted and unwise.

In past years, cable rates really never were regulated in a rational, economic manner. Rather, cable rates were a political football, kicked back and forth by the cable operator and the municipal regulator until it fell to earth somewhere that both parties could live with. In some communities, cable rates may have been kept "low" as a result of rate regulation, but the value for the cable consumer's dollar was kept "low," too.

When the cable operator is forced by government to lower its rates, it has to look somewhere to cut costs. The cable operator certainly won't cut his margins -- and, if history is any guide, local regulators won't really care what these margins are, anyway. So the cable operator will look to cut service -- and that means paying even less for the programming it buys from program producers and program services. That simply drives down the value-for-dollar that consumers derive from their cable subscriptions.

Rate regulation is not the way to improve consumer service, bring price and value more in line, and expand programming available to consumers. Competition is the way to accomplish those important objectives. Let us opt for competition over regulation.

2. Congress Should Not Eliminate Program Exclusivity

Others, in the name of competition, say that the best answer to the cable problem is to force all who produce programming for cable to deal with every would-be seller of such programming. Various measures have been introduced in this and past Congresses to require every owner of a satellite-delivered cable program service to sell to every Tom, Dick and Harry who wants to be a middleman, whether to home satellite dish (HSD) owners or to wireless cable subscribers.

These compulsions to deal are a cure that may be worse than the disease.

There is a role for exclusivity in a competitive programming marketplace. By obtaining exclusive rights in programming, competitors within and among various media distinguish themselves in the eye of the consumer. Exclusivity can be a prod to competition between media, rather than a barrier.

We have strongly supported restoration of television broadcasters' ability to obtain exclusive rights in syndicated programming against cable importation of duplicative programming. We joined those who encouraged the FCC to readopt so-called "syndicated exclusivity" rules, and the Commission has done so. Now, when a broadcaster negotiates with a program supplier to obtain market-exclusive rights in a program, the broadcaster may enforce such rights against cable system operators who bring in distant television signals containing the same program. That permits TV stations in each local market to more effectively compete with one another for viewers, and permits broadcasters to compete fairly against cable.

Similarly, we support the ability of a cable programmer to make an independent, good faith judgment to market its service exclusively to the cable medium, just as we support the ability of a direct broadcast satellite programmer to market exclusively to that medium.

What Should Be Done

The consumer's long-term interests are served by effective competition, not ineffective or unnecessarily broad regulation.

There are some types of regulation that can get at the problem of cable power, and I endorse these regulations as short-term responses to the lack of competition to cable.

But fundamentally, there is no better antidote to monopoly than to introduce the rugged forces of competition. That is the answer that, in the long term, best serves the interests of American consumers and program producers alike.

1. Deal with the Foreclosure Aspects of Vertical Integration

I appreciate the Chairman's concerns about vertical integration in the cable television industry. While I can concede that there are certain advantages to vertical integration in that industry -- just as there are in the motion picture industry -- I believe those advantages have their limits.

The cable industry's integration into certain types of programming -- I think here of services such as the Discovery Channel, C-SPAN and Black Entertainment Television -- has undoubtedly increased the diversity of choices available to consumers. But certainly such vertical integration is not a sine qua non of diversity. Many of the most popular cable program services -- ESPN, USA Network and Arts & Entertainment, among them -- have no cable industry equity interest.

The real problem with vertical integration is one of potential foreclosure of competitors. This foreclosure can take place at two levels.

First, a cable operator with an equity interest in a program service may foreclose a competing program service in which he owns no interest from access to his systems. (I have described two recent incidents of such foreclosure above.)

Second, a cable operator with an equity interest in a program service may foreclose a competing medium (e.g., wireless cable) from access to the program service, even where such foreclosure means that consumers in some areas have no other access to the program service.

Both forms of foreclosure are anti-consumer.

The first requires measures to ensure that independent programmers not owned by or affiliated with cable operators can have access to subscribers served by local cable systems. A number of options warrant consideration, including: (1) limits on the number of program services in which a cable operator may have an equity interest; (2) limits on the number of program services in which a cable operator may have a financial interest, perhaps expressed as a percentage of channels he may carry on any of his systems; (3) affirmative obligations on the part of vertically-integrated cable operators to treat unaffiliated program providers in a nondiscriminatory manner in matters such as carriage decisions, marketing of services, and subscriber fees for services; and (4) a fundamental restructuring of the "leased access" provisions of the 1984 Cable Act, to ensure that independent programmers may, as a last resort, buy their way onto cable systems.

The second type of foreclosure -- by cable against competing media -- requires equally carefully drawn responses. The ability to shut off a competing medium from any and all programming it needs in order to compete is a serious problem. But to force every programmer to deal with every competing medium poses serious risks.

If those in the wireless cable and home satellite dish industries are able to make a truly persuasive case that they have been cut off from all programming, they may well have their remedies at law. Indeed, in testimony before this Subcommittee and in other fora, representatives of the wireless cable industry have reported how, brandishing antitrust pleadings, they have shaken some programming loose from the cable industry.

If the problem of foreclosing competing media persists, perhaps the most effective answer will be to reduce the unfair bargaining power of cable, and eliminate its ability to lock up programming. This may most usefully be accomplished by limits on horizontal concentration, which I discuss below.

2. Limit Horizontal Concentration in Cable

I am not a subscriber to the theory that "bigness is badness." The motion picture studios that comprise the MPAA are among the biggest producers and distributors of motion pictures in the world. But they compete with one another, and with many dozens of large and small producers and distributors, in a rough-and-tumble marketplace in which the consumer is sovereign.

By contrast, the cable MSOs compete with no one. Each has its aggregation of franchised fiefdoms, impermeable to competitive threats.

Putting limits on horizontal concentration in cable is not likely to introduce new competition at the local franchise level. But such limits will constrain the power of a handful of national cable giants to determine the terms and conditions under which independent cable programmers will have access to tens of millions of U.S. TV households. In terms of program diversity and competition alone, such limits can yield major dividends.

I do not know precisely where that line should be drawn. I do know that the biggest of the big MSOs, Tele-Communications, Inc. (TCI), has long since crossed that line, as it now controls cable service in one out of every four U.S. cable homes.

It is high time to pull in the reins on horizontal concentration, at least until such time as most American households really do benefit from effective competition to cable.

3. Eliminate Entry Barriers to Cable's Multichannel Competitors

Over the long haul, I cannot imagine that the information and entertainment marketplace would not be better served by aggressive and free-wheeling competition than by a regulated monopoly.

That is why the Congress must ensure that those who would compete in the multichannel video marketplace with cable do not face unnecessary or inappropriate barriers to entry.

There are some barriers to entry that remain necessary to preclude turning a bad situation into a worse one. For instance, the three major television networks, who monopolize prime-time broadcast television in America, should not be permitted to extend that monopoly into cable television service.

However, Congress should leave no other stone unturned in its quest to stimulate effective competition to cable. Congress should not fail to examine any option that holds promise.

Conclusion

This hearing represents the Antitrust Subcommittee's first significant foray into the examination of the problems with television. Your colleagues in the Commerce Committee have been scrutinizing these issues for some time, and will soon undertake an extended series of hearings on all facets of media competition.

This is not new ground that I have covered in my statement. We have seen the cable problem building and swelling over the last several years, and we were among the first at the ramparts shouting, "Something must be done!"

But we have come to realize that "something" is not the same as "anything." It is critically important that the response to the evils of cable monopoly be reasoned, effective, and thoroughly considered by this Congress.

Mr. Chairman, you have introduced two bills that represent your considered views on how the problem of lack of competition to cable can be addressed. I completely share your objective. Unfortunately, as you will surmise from my statement, I am unable to support the legislative direction you have chosen. But I am committed to work with you to play a constructive and cooperative role in aiding your efforts, and those of your colleagues, to cope with the lack of competition to cable television in the U.S.

I urge this Congress, with all the passion I can summon, not to move precipitously or without clear direction to implement solutions that fail to respond to the fundamental problems... or that create new and unforeseen problems.

Please do not take my statement to reflect any lessening of concern or lack of resolve on the problem of lack of effective competition to cable. I ask only that the Congress remember in whose name and in whose interests it ultimately must act. Consumers are not well off today. Congress must only take such actions as are likely to make consumers better off in the long run. Wherever possible, let us embrace competition -- the consummate American response to lethargic and laggard consumer services -- over regulation, and let us do everything in our power to let competition flourish.

NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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(202) 944-2539

May 2, 1989

Honorable Howard Metzenbaum
Chairman, Subcommittee on Antitrust,
Monopolies and Business Rights
Judiciary Committee
U.S. Senate
Washington, DC 20510

Dear Chairman Metzenbaum:

On behalf of the 550 rural electric cooperatives and telephone system members of the National Rural Telecommunications Cooperative (NRTC) that provide satellite communications to their local consumers, I want to congratulate your leadership in support of access to programming for alternative technologies and your support of reasonable, competitive rates for entertainment television programming. NRTC supports the two bills which you have recently introduced, S 833, Cable Television Subscriber Protection Act, and S. 834, Competition in Cable Television Act. These bills provide an element of government oversight in what we have experienced to be a non-competitive environment.

By way of background, NRTC is a not-for-profit cooperative serving rural consumers through rural electric cooperative and rural telephone systems. NRTC was founded to provide an interactive utility telecommunications system using satellite technology as well as a "one-stop shop" in providing sales and service of Rural TV, a 17 channel basic package of programming (plus premium movie channels) available through the local rural utility via home satellite dish. Currently, there are more than 30,000 rural households subscribing to "Rural TV."

NRTC was incorporated August 18, 1986. From that time through June of 1988, NRTC struggled to obtain home satellite dish (HSD) wholesale distribution contracts. We experienced many obstacles in our attempts to provide an independent, quality, and reasonably-priced program package. NRTC encountered the same kinds of roadblocks outlined before your Subcommittee.

It was only through the efforts of Congress that on June 30, 1988, the evening of the House Telecommunications Subcommittee approval of The Satellite Television Fair Marketing Act of 1987, H.R. 1885, we were offered agreements for key program services (HBO, Disney, Nickelodeon, Netlink, and The Nashville Network). On August 1, 1988, we unveiled our current Rural TV package. (Brochure attached)

I am proud to say that the Rural TV package is currently one of the most complete and reasonably-priced satellite packages available. Yet, I must admit to you and the Subcommittee that while our "basic" package carries a suggested retail price of

$9.95/month, our wholesale price from the program distributors is in most cases many times higher than the wholesale price charged to cable for the identical programming services. This shocking wholesale disparity is unfair to home satellite dish owners, most of whom are rural Americans who have no access to the wealth of programming available other than via satellite.

There is no valid cost basis for the gross wholesale price disparities. At the consumer level, NRTC members provide the same level of support and service as a local cable system. NRTC members authorize and deauthorize consumer equipment, market and advertise programming, bill the consumer, and NRTC guarantees collection and payment to the programmers and satellite carriers. Like a local cable company, we are a "one-stop shop,' and the programmers and satellite carriers receive a monthly check for all our subscribers. Given that we conduct the same wholesale and retail functions as a cable operator, we see no reasonable explanation to justify the wholesale cost differentials which are standard in the HSD industry.

For your information, we are enclosing a statement which I made on March 30, 1988, in connection with the cable oversight hearings before the Telecommunications Subcommittee of the House Energy and Commerce Committee. This statement outlines some of the problems we experienced entering the marketplace. As we indicated in that statement, we cannot fully present the evidence because most of our contracts with the programmers and carriers contain confidentiality clauses which prevent disclosure of prices, terms and conditions. However, there are some experiences which we can discuss and these are included in this letter. NRTC still encounters programmers who refuse to deal and others who place unreasonable restrictions on our ability to offer their programming.

For example, Ted Turner's latest programming service, Turner Network Television (TNT), is not available to NRTC under any circumstances for home satellite dish distribution. We have visited several times with Turner Network Cable Sales and requested access to TNT for our Rural TV subscribers. As you can see from the enclosed letter, TNT is available to the home satellite dish consumer only through Turner Cable Network Sales or a local cable distributor. Local cable distributors have been given exclusive TNT distribution rights in these cable areas, not only for cable delivery but also for direct satellite delivery to the home as well.

NRTC did obtain distribution rights to the Nickelodeon service of the Viacom Networks Group, for distribution to home satellite dish consumers taking the Rural TV package. However, Viacom has not allowed NRTC to distribute its other services -- MTV, VH-1, Showtime, and The Movie Channel.

American Movie Classics (AMC), which is 50% owned by Telecommunications, Inc. (TCI), has agreed to sell their service to NRTC, but only if it is included in our basic package. However, they will not extend us a basic package rate comparable to what is offered cable systems, which is 35-cents or less. AMC has offered to sell to NRTC in basic for $1.00 per subscriber per month. We are not aware that AMC requires cable operators or SMATV systems to place their service in basic as a condition to obtaining it.

We are also aware that some programmers have given an unfair wholesale price advantage to cable operators who sell to home satellite dish consumers when compared to other non-cable distributors like NRTC. Turner Cable Network Sales, Inc. has admitted to us that our wholesale price for CNN and Headline News is greater than their wholesale price to cable operators who serve HSD consumers. This creates a three tier distribution pricing system: cable for cable, cable for HSD, NRTC to HSD. Their response is that they would prefer to raise the wholesale price to cable rather than lower NRTC's price even though, admittedly, NRTC has a greater HSD subscriber volume. Because Turner Cable Network Sales, Inc. is also a packager of programming, they have no intention of helping to provide a level playing field for NRTC as a competitor.

In the 1988 Satellite Home Viewer Copyright Act (Public Law 100-667) passed by Congress and signed into law by President Reagan, a provision was included that directed the Federal Communications Commission to prepare a report on whether discrimination exists against distributors of the superstation and network signals. The Notice of Inquiry released May 1, 1989 will require these satellite carriers to file actual contracts with the FCC for review. I've attached two letters and supporting documents which outline the type of discrimination that NRTC has experienced in dealing with these satellite carriers.

Eastern Microwave provides its WWOR and WSBK signals to cable and Small Master Antennae Television (SMATV) operators for 18 to 20 cents per subscriber per month. Eastern has advised us that the lowest per signal base rate for any third-party distributor to the HSD market is $1.34 per subscriber per month. Thus NRTC will pay 644% more than a cable system for these two superstation signals even though we provide the same functions as a cable system.

Southern Satellite Systems, Inc., a subsidiary of Tempo Enterprises, Inc., which is owned by TCI provides the Superstation TBS signal to cable operators for 10-cents per month per cable TV and SMATV subscriber.

Before the Satellite Home Viewer Copyright Act of 1988 passed, Southern had established itself as the exclusive provider of the WTBS signal to the home satellite dish market. All distributors were agents of Southern, with no control over price or other key competitive terms. All sales to the home satellite dish market where annual subscriptions, collected and remitted in advance to Southern. Southern did not allow direct authorization by distributors. Only cable companies could sell to home dish customers who did not lease or purchase equipment from the distributor. Competition was blocked as all distributors, except cable companies, were required to collect $19.95 per year retail from home satellite dish customers.

Non-cable distributors of WTBS to the home dish market received a commission of $8.95 per yearly subscription for sales of the signal which cost, at wholesale $11.00 per year. Compare this $11.00 to the cable price of $1.20 (10-cents x 12 months) -- more than 9 times the price for the same product.

At the end of March, Southern sent letters to home satellite dish distributors cancelling the previous contract implementing a new contract automatically. In the new contract, Southern increased the rates 70-cents on annual subscriptions and blamed the price increase on additional copyright costs under the new Satellite Home Copyright Viewer Act.

We do not believe Congress intended the Satellite Home Viewer Copyright Act to be used as a basis for increased prices to the home dish market.

One other point needs to be made. At this time, there is a serious problem with HSD video signal theft. HSD "pirates" have defeated the General Instrument VideoCipher II descrambling system. These pirates modify or "chip" consumer descramblers by illegally authorizing the equipment to receive programming without obtaining a legal authorization for service through the General Instrument DBS Center. Current estimates are that 55-60% of the 1.2 million consumer descramblers produced have been illegally modified. Consumers who use these descramblers receive programming without subscription fees.

NRTC believes that General Instrument and the programmers have provided the incentives for illegal video pirates to operate and thrive. The unjustly high cost of equipment and programming has contributed to the growth of piracy. If programming alone were priced fairly to the HSD consumer, there would be lessened incentive to risk illegal modification of descramblers.

The home satellite dish customer is truly treated as a second class citizen. Cable proponents argue that prices for HSD programming is comparable or even lower than cable service. This is ludicrous. I am enclosing a chart which shows how much more it costs a HSD consumer to obtain programming than a cable subscriber. The key point is that cable service includes the distribution system and the programming for a monthly fee, now averaging $14.60 per month. The National Cable Television Association says that for this amount the average subscriber receives approximately 35 channels of programming.

The HSD consumer must purchase, lease or finance the satellite dish. A competitive price for quality equipment with descrambler would be $49.95 per month. The HSD consumer must then purchase the programming. Considering programming alone, it would cost the HSD consumer $29.12 per month to get a comparable 35 channel package. This includes 10 basic channels at no cost because they have not yet scrambled their signal. The total cost to receive a comparable 35 channel home satellite dish programming is $79.07 per month.

As you can see, NRTC has great experience in the cable programming marketplace. We are viewed as a potential competitor to cable, and have experienced similar difficulties as have the other competing cable technologies (wireless cable and SMATV). I must point out that NRTC's mission is not as a competitor to cable. Our interest is in providing information, education and entertainment programming to those rural residents beyond the reach of cable. We want to serve those rural residents who do not have access to the programming choices and opportunities that have long been available to the 77 million homes in urban America passed by cable lines.

We believe that large and powerful cable multiple system operators have protected themselves from competing technologies. Cable owned or controlled programming sources refuse to sell to competitors, give exclusive territorial protection to cable operators and establish excessive wholesale pricing to discourage competing technologies. Programming prices are propped up and programming access is denied to potential competitors to protect cable franchise areas and cable system values NRTC and its members are angered because we are are forced to pay five to ten times more for programming, while some programming is not available to us at any cost.

The result of this monopoly control of programming is that rural Americans outside cable service areas are treated as second class citizens. New technology available to rural America is discouraged or denied credible, service-oriented rural institutions, such as the electric cooperatives and telephone systems, who can bring these benefits to millions in rural America. And, alternative technologies to cable are stifled by charges that the delivery systems are unproven or insecure or the parties that seek to develop and promote these alternatives are unreliable or financially irresponsible.

Mr. Chairman, there is no justification for the way that NRTC has been treated in the marketplace. The inflated wholesale prices we pay and the denial of product distribution seriously impact our chances to continue to provide programming service and honest competition to rural America. If we are driven out of the market, the only competitive, non-cable controlled market force will be removed. Then the rural consumer's viewing choices will be completely controlled and priced by cable and cable programmers.

Please know that I would be pleased to appear before you and discuss these issues before the next hearing conducted by your Subcommittee.

Thank you.

Very truly yours,

B. R. Phillips, III
Chief Executive Officer

BRP:jem
cc: Bob Bergland, National Rural Electric Cooperative Assn.

A Comparison of Typical Retail Cost for Home Satellite Dish Owners vs. Cable Subscribers

Home Satellite Dish System
10-foot dish, with integrated receiver/descrambler, installed—$49.95/month lease

Cable System
no direct charge—built into month fee

Programming

35 Channels on the Home Satellite Dish

Arts and Entertainmt.
Black Entertainment
C-SPAN II
CNN
Country Music TV
ESPN
The Learning Channel
MTV
Bravo
TNN
USA Network
The Weather Channel
American Movie Classics
C-SPAN
CBN Family Channel
Headline News
Discovery
Financial News Network
Lifetime
Nickelodeon
TBS
TNT
VH 1
Home Shopping Network
Netlink: KUSA, KMGH, KCNC, KWGN, KRMA (PBS)
Skyline Silver: WSBK, KTLA, WWOR
Superstar Connection: WGN, WPIX, KTVT

35 Channels on Cable

Arts and Entertainmt.
Black Entertainment
C-SPAN II
CNN
Country Music TV
ESPN
The Learning Channel
MTV
Bravo
TNN
USA Network
The Weather Channel
American Movie Classics
C-SPAN
CBN Family Channel
Headline News
Discovery
Financial News Network
Lifetime
Nickelodeon
TBS
TNT
VH 1
Home Shopping Network
Four local stations including PBS
WSBK, KTLA, WWOR
WGN, WPIX, KTVT

Home Satellite Dish Service

Equipment/total monthly lease	$49.95
35 channels	$29.12
Basic Service	**$79.07**
Equipment/total monthly lease	$49.95
35 channels plus 1 premium @ $5.50	34.62
Basic Service +1 premium	**$84.57**
Equipment/total monthly lease	$49.95
35 channels plus 2 premuims @ 11.50	40.62
Basic Service + 2 premiums	**$90.57**

Most Ecomonical Home Satellite Dish Combination (per month):	**Purchase**
Viacom's Extraview	$10.95
Netlink's One-Stop package	$10.50
Turner Home Satellite - TNT*	$1.67
Superstar Connection and Skyline Silver**	$6.00
	$29.12

* (Only sold annually for $20.00/yr.)
**(Only sold annually for $72.00/yr)

Cable Service

NO EQUIPMENT PURCHASE IS NECESSARY

35 channels	
Basic Service	**$14.60***
Basic Service + 1 premium @ 9.00	**$23.60**
Basic Service + 2 Premiums @ 17.00	**$31.60**

* *Retail pricing and average number of channels purchased by cable subscribers was supplied by The National Cable Television Association.*

May 11, 1989

Although the purchase of the Home Satellite Dish programming packages results in 5 duplicated channels (ESPN, USA Network, Lifetime, The Weather Channel, WGN) this combination is the most economical. The home satellite dish program offering includes 10 channels that are not scrambled (A&E, Black Entertainment, C-Span, C-Span II, Country Music TV, Discovery, Financial News Network, The Learning Channel, Bravo, Home Shopping Network). For the purposes of this analysis, we used the best price available by quoting premiums as part of a basic service package — $5.50 for one premium and $11.50 for two premiums.

STATEMENT OF BOB PHILLIPS
CHIEF EXECUTIVE OFFICER
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

OVERSIGHT HEARINGS ON THE CABLE INDUSTRY

TELECOMMUNICATIONS SUBCOMMITTEE OF THE
ENERGY & COMMERCE COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

MARCH 30, 1988

Thank you Mr. Chairman and members of the Subcommittee. My name is Bob Phillips and I am the Chief Executive Officer of the National Rural Telecommunications Cooperative, a national organization of 500 electric and telephone systems serving the sparsely-settled areas of the United States. The NRTC has been in the forefront of offering its "Rural TV" package of television programming to our rural households. As I've testified before you at previous hearings, the satellite delivery technology is ideally suited to serving rural America, where there are an estimated 20 to 30 million consumers who will never receive the benefits of cable service.

I am pleased that the Subcommittee has decided to hold these hearings. Given NRTC's experience in the marketplace during the past year, we have grave concern that **the home satellite dish marketplace is not working.** There are several factors that are critical to this conclusion:

o CABLE CONTROLLED DISTRIBUTION This marketplace still needs an effective local distribution outlet for the consumer which is not controlled by cable. NRTC represents the only independent (non cable owned or controlled) source for local one-stop shopping.

o PRICE DISCRIMINATION The home satellite dish market does not have fair access to programming on reasonable terms and conditions including price. Prices are still 500-700% higher at the wholesale level and many programmers require annual advance payments and other inconvenient terms. It is clear that cable customers are served under much more favorable terms and conditions as compared to the rural home satellite dish consumer.

o CONTROL OF THE TECHNOLOGY One company, General Instrument, owns the descrambling technology which is used for the home satellite delivery system. The pricing of decoders is extremely high and there is a serious threat to the development of the home satellite dish industry due to the current level of piracy. The piracy continues to plague the development of the industry not only because of deficiencies in the technology but more importantly because of the lack of an effective local distribution network.

Turning to the main point of this series of hearings, I'd like to focus on fair access to programming on reasonable terms and conditions for the home satellite dish industry.

We believe that cable continues to dominate the development of the home satellite dish marketplace because cable operators are concerned about controlling this new technology. We believe that cable perceives direct to home satellite delivery as a competitive threat. Cable operators realize that in the future the home satellite dish may even supplant hardwire cable systems. Therefore, cable's interest is directed toward controlling this new technology. We would like to present evidence of this cable domination for the Subcommittee's consideration.

o VERTICAL INTEGRATION Large cable multiple system operators (MSOs) have continued to purchase ownership interests in many programming sources. In this way, cable controls not only distribution of the product into the living room, but also exercises ownership and control of the product itself.

We've included recent articles disclosing the degree of ownership of the various cable programmers as well as the satellite carriers who deliver superstation signals to the cable and home dish markets. There is one company, in particular, which is so dominant in the video distribution market that it should be specifically considered during the Subcommittee's deliberations. Telecommunications Inc., (TCI) is a cable MSO which now owns or controls systems serving 6 million subscribers and has a stake in companies serving another 2.4 million cable homes. We have included several articles about TCI and its activities to give the Subcommittee a view of its domination in the cable and home satellite dish marketplace. To illustrate our point about vertical integration, consider TCI's ownership of all or a portion of each of the following programming services:

The Discovery Channel	-	14%
Turner Broadcasting -CNN -Headline News -WTBS	-	12%
Black Entertainment TV	-	16.5%
American Movie Classics	-	50%
Cable Value Network	-	11%
The Fashion Channel	-	9.9%

Netlink satellite carrier for - 40% also (40% WTCI)
-KUSA (ABC)
-KCNC (NBC)
-KMGH (CBS)
-KRMA (PBS)
-KWGN (Tribune)
-KDVR (Fox)

Tempo Enterprises - 100%
-Southern Satellite Systems, satellite carrier for WTBS
-Tempo Television

The Weather Channel - Unknown

TCI's most recent multi-million dollar acquisition is the purchase of Tempo Enterprises which operates a variety of cable and programming related businesses including Southern Satellite Systems Inc., a satellite carrier which delivers the superstation, WTBS, to over 41 million cable homes and also directly to the home satellite dish market.

o CONTROL OF DISTRIBUTION As this Subcommittee has already heard in prior hearings on the satellite industry, there has been a continuing effort by cable and cable programmers to control distribution. You may recall, HBO's original distribution scheme to the home dish market which provided local cable operators with a brand utilization discount (BUD) kickback each time a home satellite dish owner purchased HBO's programming. Congress' outrage made short work of this scheme. Cable distribution of programming to the home dish owner is still limited by service area restrictions based upon cable franchise areas plus one adjacent county. Since TVRO programming is in many cases being withheld from distributors other than cable systems, this limits consumer choice and opportunity to seek competitive pricing and alternatives. These geographic restrictions are particularly ironic given the unlimited delivery capability of the satellite technology.

TCI will tell you that they do not have a controlling ownership interest in the programming services. However, when a distributor to 8 million subscribers sits at the negotiating table the programmers listen. No cable programmer dependent upon the cable distribution monopoly dares to place the fledgling home satellite market on par with its cable baseload mainstay business. Even those programmers like HBO and Showtime who would like to market direct to home, won't bypass cable.

There is a double standard in the video marketplace. Cable distributors pay one price at wholesale for their subscriber's programming, while home dish market distributors purchase the same product at an unreasonably high rate. Cable operators and cable programmers, as well as present government regulators, justify this price disparity arguing that these are two different marketplaces. The demand for and lack of competing entertainment and information alternatives in the rural market somehow are supposed to justify this price disparity. As NRTC represents a rural constituency which does not have cable access or other good video opportunities, we find this attitude to be "urban arrogance" at its highest level.

Actually, there is an underlying business motive to the cable-TVRO price disparity. If direct to home programming and service were available on a truly cable-comparable basis, cable systems would see further penetration in their marketplace. The current penetration of satellite dishes inside cable boundaries is estimated at 30%. Cable deregulation, with its increasing cable prices and relaxed service standards, have made direct distribution methods more attractive to the consumer. But cable is not threatened, if it owns and/or controls the product from the supply side and delivery on the distribution side.

Mr. Chairman, we would like to present several specific examples of NRTC's experience in the TVRO marketplace over the past year which substantiate our points.

First of all, we felt that 1000 local distribution outlets of rural electric cooperatives and an additional potential of 1000 rural telephone systems would be a welcomed participant to expand the fledgling home satellite dish industry and the programmers viewing potential. As NRECA's Bob Bergland testified before this Subcommittee in 1986, the rural utility systems have the dedication and the infrastructure to support the programmers product's delivery to 30 million rural homes who have no access to cable. Not only did Bob Bergland believe we could do this, but members of this Subcommittee applauded our interest in serving the unserved. Even programmers appearing before the Subcommittee expressed their willingness to consider us as a distributor. Disney's John Cooke said the Disney Channel would "unequivocally" be interested in distributing their movies and family home entertainment to potential consumers in rural areas of the U.S. through the auspices of NRTC. Yet, Disney, in announcing their May 11, 1988 scramble date and distribution plans said they will only sell direct (via a 1-800 telephone number) and through cable systems. Disney, has had no meaningful discussions with NRTC to be a distributor in the two years since testifying before this Subcommittee.

Two other key premium program providers, HBO (owned by Time Inc., a cable MSO) and Showtime/The Movie Channel (owned by Viacom, a cable MSO) have also refused to sell through NRTC.

Both have refused to deal with NRTC despite a $1,000,000 pre-buy offer by NRTC. They also distribute direct and through cable systems with territorial restrictions limiting them to TVRO sales adjacent to their franchise areas.

Another category of examples would include those programmers and satellite carriers who have initially indicated intentions to deal with us, but since have reversed themselves and refused.

Netlink, a satellite carrier and TVRO authorization service, sent a representative to meet with us in March 1987, prior to TCI's "investment" in Netlink. After that meeting, Netlink followed up with an encouraging letter and a contract, proposing that NRTC be one of their distributors for the six Denver-based program channels they uplink. No sooner had we begun to finalize the contract details, we learned that TCI was purchasing a 40% stake in Netlink in addition to the 40% already held by Western TCI. Netlink immediately advised us that they would not complete the contract with us and that they would not serve the TVRO market due to the uncertainty of the legality of the compulsory copyright payment for TVRO subscribers. While Netlink pursued its direct and TCI's cable distribution plans, Netlink's President Brian McCauley denied they were serving the market. Later, he told us that the company was only taking "reservations" from TVRO owners. When we confronted him with actual advertisements offering the service he suggested that their plans were still not firm and the ads may have been a mistake by their marketing department.

In July, he wrote me a letter still denying that they were selling programming directly or through any other source due to confusion over the compulsory license. He also indicated they were working to reach a voluntary distribution agreement with the networks for service to white areas.

In January of 1988, McCauley told us that they would not sell through NRTC or any other third-party until they had reached an accord with the networks. Meanwhile they were selling direct and through cable operators.

When McCauley appeared before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice to testify in support of the HR. 2848 he said that Netlink was "testing" service to the TVRO market and would not be ready to offer the service through sources other than cable until the plan they were testing was worked out and copyright legislation was clarified.

However, last week it was reported that Netlink announced that Echosphere, an equipment manufacturing and distribution firm would be the sole TVRO distribution company selling Netlink's six channel Colorado broadcast station package. McCauley called the program a "trial for Netlink."

In addition Netlink kicked off a national dealer program which gives satellite dealers a commission to sell for Netlink. A Netlink official said the program, "expands our cable operator's share of the marketplace dramatically." TCI is also soliciting other cable MSO's to become equity partners in Netlink.

When we called Mr. McCauley this week to discuss the announcement, he confirmed the Echosphere story and added that Echosphere might be the only entity that could implement the TCI screening process for service to white area customers. He again said it was a test and he couldn't tell us anything else until mid Summer.

NRTC has had some success in negotiating contracts which at least allow us to enter the marketplace and begin offering a package of programming. Our progress has been hampered by some programmers who have only been willing to deal with us subject to certain restrictions.

Southern Satellite Systems which is a satellite carrier owned by Tempo Enterprises, uplinks the WTBS signal for distribution to cable systems and the home dish market. Tempo Enterprises has been acquired by TCI. Southern Satellite Systems has set itself up as the exclusive provider of the WTBS signal to the home dish market. All distributors for Southern are agents. They have no control over price and other key terms. For example all sales by agents must be annual subscriptions, collected and remitted in advance to Southern. Southern does not allow direct authorization by distributors and only cable affiliates can sell to customers who do not lease or purchase equipment from the distributor.

Most importantly, Southern has insured that there will be no competition on price for WTBS to the home dish market because all the distributors are agents who collect the full retail $19.95 per year. Compare this retail price to the cable wholesale price of WTBS to the cable operator---10 cents per month.

Other restrictions we have encountered are territorial in nature. ESPN limits our distribution to areas outside of cable affiliate franchise territory unless the cable affiliate does not sell to the home dish market. Likewise CNN and Headline News restrict NRTC marketing efforts to the "operating areas" of our membership.

However, the above restrictions and prohibitions pale in comparison to the price disparity that is occurring in the TVRO marketplace. Unfortunately we are unable to fully present the evidence. The contracts which we have entered with programmers and satellite carriers, prohibit us from disclosing terms, condition and price. I have testified before this Subcommittee that in general terms the price at wholesale exceeds cable wholesale prices for the same product by as much as 500-700%. This continues to be an accurate representation of the price disparity.

We have prepared an attached comparison of pricing for the Subcommittee's benefit. The first attachment illustrates the retail cost of service for home dish users compared to cable service. It also shows the typical cost for the programming which the cable system pays on a per subscriber basis at wholesale.

Another attachment shows the TVRO packages available today through HBO, Showtime, TCI Netlink and NRTC. This attachment shows the current pricing and controlling interests of the various packagers.

A final attachment illustrates the savings that could be achieved for the home dish market through our distribution effort if programming could be purchased by NRTC at the same price level as cable companies now pay.

As you can see from the chart, the home satellite dish basic package which is now offered for $9.95 by NRTC members could be cut almost by half if we were on a level playing field with the cable operator. Mr. Chairman, I want to emphasize to the Subcommittee, NRTC member utilities offer a programmer the same level of marketing, distribution, billing, service, authorization, etc. as a cable system. No valid reason has ever been given for the level of price discrimination we have encountered in the marketplace.

I want to thank you for the opportunity to testify before you today.

1625

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

May 12, 1989

Hon. Howard M. Metzenbaum
Chairman
Senate Subcommittee on Antitrust, Monopolies &
Business Rights
308 Hart Senate Office Building
Washington, D.C. 20510

~~Dear Senator Metzenbaum:~~ Dear Senator —

I would like to commend you on the April 12 hearing conducted by your subcommittee concerning growing anti-competitiveness in the cable industry. Much as in your home state, New York City has experienced increasing cable rates since cable deregulation took effect.

I appreciate your allowing me to submit the attached statement for the record, which discusses the City's concerns with the ever growing cable industry, and some suggestions to rectify them.

Please do not hesitate to contact me or Judy Chesser in my Washington office, if we can be of any further assistance in your efforts to address this issue.

All the best.

Sincerely,

Ed

Edward I. Koch
MAYOR

Attachment

Statement by Edward I. Koch

Mayor of the City of New York

Thank you Mr. Chairman for allowing me to submit testimony at this hearing regarding the anti-competitiveness of the cable industry before the Senate Subcommittee on Antitrust, Monopolies and Business Rights.

The cable television industry has become an unregulated perpetual monopoly. For the residents of New York City, passage of the Cable Communications Policy Act created a major disadvantage for the basic consumer seeking good service and diversified news, entertainment, sports and other programming. The Cable Act has proven itself to be a major hurdle in the City's efforts to ensure affordable cable television services to all residents.

New York City is the leader in the communications marketplace. In 1970 we granted two cable television franchises to cover Manhattan. This set the municipal regulatory standard for over a decade. The Manhattan franchises required that (1) service be made available to all residents, (2) the system keep pace with the state of the art -- a requirement that has enabled us to cause the current franchise holders to upgrade their systems; and (3) there be a set aside of channels for leased and for municipal and public access.

In 1983 we granted franchises to cover the remaining four boroughs, the Bronx, Brooklyn, Queens and Staten Island. Once again we established the national standard for reasonable regulation of cable television.

Mr. Mooney's (NCTA President) testimony chronicled the movement and discussions surrounding the House and Senate legislation, which ultimately became the Cable Act of 1984. I would like to offer my historical perspective of that process, as I was involved then, and am committed now to seeing that the 1984 Act be revisited to protect the consumer and generate greater competition in the marketplace.

As I predicted seven years ago, when I became concerned about federal efforts to protect the cable television industry, it is almost an impossible task to protect the public interest in the face of federally imposed deregulation. The public appears to be losing ground.

The slippery path towards deregulation in cable television was started by Senator Goldwater in 1982. The City testified in April 1982 before the Senate Subcommittee on Communications in opposition to the Goldwater legislation, S. 66, stating that cable television was not in need of federal protection and that the efforts to preempt local decision-making to "foster the growth of cable television" would be harmful to consumers. Again in February 1983, the City testified before the Senate Subcommittee in connection with that legislation. We stated

> "the City disagrees with what appear to be the underlying premises of S. 66: (1) that cable television is a developing industry that must be

> protected from local jurisdictions by the federal government, and (2) that the cable industry faces a sufficiently competitive environment such that local regulation is no longer necessary....The facts do not bear out these propositions."

In May 1983 I testified before the House Subcommittee on Telecommunications. I told the Subcommittee that "there is no need for federal cable legislation and that the industry as a whole is in such a state of flux that this is not an appropriate time to develop such legislation." Further, I told the subcommittee that it was the City that must "ensure public interest goals such as equivalent services for all residents, diversity of sources of information, the upgrading of systems consistent with local needs, and access to the cable system on a non-discriminatory basis."

The initial version of Senator Goldwater's cable legislation was adopted by the Senate. Indeed, on June 13, 1983, Senator Goldwater said on the Senate floor that there was a coalition for cities -- "I do not know how many there are. All I know is that New York City is one of them. This coalition opposes this bill." The Senator misunderstood our interest; he thought we wanted a "bigger bite on the cable company." In fact, we were trying to protect the people, our consumers, from the dangers of an unregulated perpetual monopoly.

I gained some notoriety in 1983 for helping to derail that legislation and a similar House bill that would have stripped New York City and all other franchising authorities of any ability to ensure that the use of streets for cable television would benefit all our residents. The City participated in the negotiations that led to a new compromise which became the Cable Act of 1984. The Cable Act was a lesser evil -- but an evil nevertheless. Now, based in part on the way the Cable Act has been interpreted by the FCC and the courts, it must be reexamined.

For example, the Cable Act prohibits franchising authorities from regulating the rates charged by cable television operators in all areas where there is effective competition with the cable system. The FCC has determined that the existence of three television stations in a market is the equivalent of effective competition to cable television. How many areas of this country are you aware of that cannot receive at least three television station signals? I believe the reality of the FCC's determination is fiction.

In my view, the only effective competition to a cable system is another cable system. As I understand the economics of cable television, it is only in the rarest of situations where head-to-head competition can take place. Therefore, Mr. Mooney's statement that cities are not prohibited from authorizing more than one franchise is accurate, but facetious at best. We are currently studying whether we can have competition in New York City. Until such competition exists, however, the unchecked right of cable operators to charge monopoly prices has become a significant concern for the City.

Since deregulation, the cost for basic cable service for some subscribers in the City has increased by as much as 74 percent. Indeed, the unchecked right of cable operators to charge monopoly prices has become a significant concern for all of the nation's cities and towns, as Tom Volgy, Mayor of Tucson, Arizona, and Saul Ramirez, Mayor Pro-Tem and Councilman of Laredo, Texas, both testified before the Subcommittee.

The adverse effects of deregulation are not limited to monopoly rates. The FCC has attempted to preempt our ability to monitor and enforce the technical performance of cable operators. The FCC assumes the marketplace will correct poor service. The marketplace works for many services and businesses -- cable is not one of them. The technical quality of the systems and the companies' efforts to repair problems is a significant issue in this City. There are no significant competitive restraints on the companies. I must emphasize that it is highly unlikely that cable company to cable company competition, the only true competition, will arise because of the capital intensity of the business. It is therefore contrary to the public interest for the cable industry to be free of reasonable local regulation.

In addition, as the holder of a non-commercial broadcast license for WNYC-TV, Channel 31, the City's municipal broadcasting system has been restricted due to the outcome of the "must carry" debate. The current "must carry" rules emanated from the deregulation momentum of the 1984 Cable Act. WNYC reports that there are 69 cable systems within its grade B contour. Yet, only 35 of those systems carry the station on a full-time basis. WNYC is a public broadcaster that offers alternative programming in several different languages not only to viewers in New York, but New Jersey and Connecticut as well. In a City like New York that can count at least 175 different ethnic groups, WNYC offers a valued service. WNYC's efforts to increase cable carriage of their programming consistently ends at the same stumbling block -- the cable system's preference for money generating programming.

To make matters worse, the Cable Act has created an intricate procedural maze to hamper our ability to make a good faith determination whether or not a cable franchise should be renewed. We currently face renewal issues in Manhattan. The process is cumbersome, time consuming and adversarial. Our ability to deny a renewal is severely circumscribed. We are prevented from selecting the firm that would best serve the public interest, even after the original franchise holder has long since recouped its investment.

Thus, the Act, as interpreted by the FCC and the courts, has created the monster I feared seven years ago -- an unregulated, potentially perpetual monopoly with no significant constraints or needs to serve the public. This is an intolerable situation. I have pledged myself to take an active role in seeking legislative changes in this area.

The residents of New York City and the other towns and cities in the state and across the country should be able to share in the benefits of the communications services made available through cable television at reasonable costs. The Cable Act does not help them do that. I hope that with the benefit of the experience since the passage of the Cable Act, the Congress will listen to the public and to those of us who represent the public interest.

I am extremely pleased that you, Senator Metzenbaum, are continuing your oversight of the cable industry's anti-competitiveness in the 101st Congress. Also, the legislation you have proposed, the Cable Television Subscriber Protection Act of 1989 and the Competition in Cable Act of 1989, is a good start. The City supports your bills, but believes further initiatives must also be considered to ensure that all consumers of cable television are protected from monopoly abuse.

Regrettably, there have not been enough Members of Congress who, like you, care about the consumer's side of this issue. I am very glad, Senator Metzenbaum, to see your efforts on this matter, and I feel more confident that through you, the public interest will be served and well protected. Thank you.

National Association of Regulatory Utility Commissioners
Incorporated

HENRY G. YONCE, *President*
South Carolina Public Service Commission
111 Doctors Circle, Post Office Box 11649
Columbia, South Carolina 29211

SHARON L. NELSON, *First Vice President*
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PAUL RODGERS
Administrative Director
General Counsel

GAILE ARGIRO
Treasurer

April 12, 1989

Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies
and Business Rights
Senate Committee on Judiciary
308 Hart Senate Office Building
Washington, D.C. 20510

Re: Statement for the record of Subcommittee hearing on cable television industry

Dear Chairman Metzenbaum:

On behalf of the National Association of Regulatory Utility Commissioners (NARUC), I respectfully request that this letter and the attached policy resolution be included in the record of your Subcommittee's April 12, 1989 oversight hearing on competition in the cable television industry.

Prior to enactment of the 1984 Cable Communications Policy Act, seven state utility commissions regulated the provision of cable television service.[1] The NARUC was active in opposing the Act which allows most cable operators to set their rates for subscribers without any government influence--local, state or federal.

We feel that cable companies are, with rare exception, no less monopolies within their service territories than electric, gas, water or telephone companies. If left unregulated, cable operators will continue to exploit their monopoly status by charging exorbitant rates to subscribers; discriminating in favor of programming in which they have a financial interest; charging local independent stations for carrying their broadcasts or not carrying them at all; and limiting the sports and entertainment programs available for free on regular television.

---

[1] Those states are Alaska, Connecticut, Delaware, Nevada, New Jersey, Rhode Island and Vermont.

In another disturbing trend, cable systems are becoming more and more vertically-integrated and, as a result, are denying their only competitors, wireless cable, access to a significant segment of cable programming.

Despite this market power, the 1984 Cable Act provides the industry with several unnecessary advantages. For instance, cable companies' "compulsory license" allows them to retransmit broadcast signals for nominal payment. The Act has also made cable franchise renewals virtually automatic.

Perhaps the most harmful aspect of the law, however, is that it gives the Federal Communications Commission the authority to define the standard for regulating cable rates. In doing so, the Commission determined erroneously that over-the-air television provides effective competition for cable. That judgment has allowed cable operators in almost every community in the nation to set rates freely. The result is that rate increases have been as high as 300% in some areas. The Consumer Federation of America has determined that basic cable rates have risen 36 percent since rate deregulation in January, 1987, after having increased 21 percent during the 1984 to 1986 transition to deregulation.

The NARUC urges your Subcommittee to consider legislation which would repeal those portions of the Act which preempt state and local officials from regulating cable rates and services [See Attachment A]. It has become apparent that the limited authority granted the FCC has been inadequately exercised. State and local governments are in a better position to assess the degree of competition in a given area and to protect the interests of the viewing public.

Please call me if you have any questions at 898-2206.

Sincerely,

Caroline M. Chambers
Director, Congressional Relations

Attachment

ATTACHMENT A

Resolution Urging the Amendment of the Cable Communications Policy Act of 1984 to Protect the Public Interest

WHEREAS, Cable television systems provide news, information, sports and entertainment programming to millions of American households under franchises awarded by government officials; and

WHEREAS, As systems have grown, television generally, and cable television services specifically, have become increasingly important to the American public as reflected by the following statistics: of approximately 90 million American households, 87 million possess televisions (compared to 82.6 million which possess telephones); 70 million households have access to basic cable services, and 43.5 million subscribe to basic cable services--almost half of all households; and

WHEREAS, The Congress enacted the Cable Communications Policy Act of 1984, which, beginning in January 1987, prohibits State and local governments from regulating the rates and services of cable systems; and

WHEREAS, Despite the enactment of this statute, recent studies conclusively indicate that cable systems remain monopolies, now unregulated, within their franchise territories; and

WHEREAS, This monopoly power, coupled with deregulation, has led to steep rate increases; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), assembled in its Winter Committee Meeting in Washington, D.C., hereby urges the Congress to repeal the provisions of the Cable Communications Policy Act of 1984 which prohibit State and local officials from regulating the rates and services of cable television systems.

Sponsored by the Committee on Communications
Adopted March 3, 1988

macta

Minnesota Association of Cable Television Administrators

P.O. Box 26658
Minneapolis, MN 55426

April 19, 1989

Senator Howard Metzenbaum
Senate Judiciary Committee
Subcommittee - Antitrust Monopolies & Business Rights
140 Senate Rayburn Office
Washington, DC 20510

Dear Senator Metzenbaum,

Attached you will find information pertaining to the bill regarding cable subscriber rates reregulation. Chris Harvie has asked that I forward this information directly to you.

The information contains a list of communities within 50 miles of the Minneapolis/St. Paul metropolitan area, the cable TV subscriber rates charged by the communities' cable operators in 1986 and 1989 and the percentage increase over that period. The rates indicated reflect what was charged as the "basic service package" and do not include any premium channel services, remote control costs, etc.

You will note that in the **Twin City metropolitan area basic service costs increased on the average 46% from 1986 to 1989. In addition, 57 communities surveyed experienced a cost increase of at least 50% over the same period with several franchised areas having received over 70% increases in basic service costs from 1986 to the present.**

In obtaining the rates I contacted the public body which represents cable related activities for the listed communities. For example, the Burnsville/Eagan Cable Communications Commission represents the cities of Burnsville and Eagan, Minnesota. All public bodies listed belong to the Minnesota Association of Cable Television Administrators' (MACTA) membership list.

In addition to being the cable administrator for Burnsville and Eagan I also serve on the MACTA Board of Directors and am co-chair on MACTA's Legislative Committee. It should be noted that MACTA is a state chapter of the National Association of Telecommunications Officers and Advisors (NATOA).

The Minnesota Chapter of NATOA—
The National Association of Telecommunications Officers and Advisors

If you desire further information or have any questions on the attached list please do not hesitate to contact me at 612-454-8100.

Sincerely,

Mike Reardon
Co-Chair MACTA Legislative Committee

cc: Chris Harvie

PUBLIC BODY	COMMUNITIES SERVED	1986/ 1989 RATE	%INCREASE
Apple Valley Cable TV Advisory Board	Apple Valley	$9.95 - $16.95	70%
City of Bloomington	Bloomington	$11.40 - $15.22	34%
Burnsville/Eagan Cable Communications Commission	Burnsville, Eagan	$10.95 - $16.45	50%
Central Saint Croix Valley Joint Cable Communications Commission	Bayport, Stillwater, Oak Park Heights, West Lakeland Twnshp., Baytown Township, Stillwater Township	$10.00 -$16.45	65%
Chaska Cable TV Regulatory Commission	Chaska	$12.55 - $15.95	27%
Columbia Heights/Hilltop Cable Communications Comm.	Columbia Heights, Hilltop	$10.95 - $16.45	50%
Hastings Cable TV Commission	Hastings	$12.90 - $16.45	28%
Lakeville Cable TV Board	Lakeville	$9.95 - $16.95	70%
Lake Minnetonka Cable Comm.	Deephaven, Orono, Minnetonka Beach, Greenwood, Medina, Minnetrista, Shorewood, Tonka Bay, Spring Park, Victoria, Woodland, Long Lake, St. Bonifacius	$12.35 - $16.95	37%
City of Minneapolis	Minneapolis	$10.95 - $16.95	55%
North Central Cable Communications Commission	Blaine, Ham Lake, Centerville, Circle Pines, Lexington, Lino Lakes, Spring Lake Park	$10.95 - $16.45	50%
North Suburban Cable Commission	Arden Hills, Falcon Heights, Lauderdale, Roseville, Little Canada, Shoreview, Mounds View, North Oaks, New Brighton, St. Anthony	$9.95 - $16.45	65%

PUBLIC BODY	COMMUNITIES SERVED	1986/ 1989 RATE	%INCREASE
Northern Dakota County Cable Communications Comm.	Lilydale, Mendota, Inver Grove Heights, Mendota Heights, South St. Paul, Sunfish Lake, West St. Paul	$10.95 - $15.00	37%
Northwest Suburbs Cable Commission	Brooklyn Center, Brooklyn Park, Crystal, New Hope, Golden Valley, Osseo, Maple Grove, Plymouth, Robbinsdale	$10.45 - $16.45	57%
Quad Cities Cable Commission	Andover, Anoka, Champlin, Ramsey	$10.95 - $16.45	50%
Ramsey/Washington Counties Suburban Cable Commission	Birchwood Village, Dellwood, Lake Elmo, Grant Township, Mahtomedi, Maplewood, North St. Paul, Oakdale, White Bear Lake, Willernie, Vadnais Heights, White Bear Township	$9.42 - $16.45	75%
City of St. Paul	St. Paul	$8.95 - $15.50	73%
City of Savage	Savage	$9.95 - $16.95	70%
Shakopee Cable Commission	Shakopee	$10.95 - $15.95	46%
Sherburne/Wright Cable Commission	Big Lake, Cokato, Buffalo, Dassel, Delano, Elk River, Maple Lake, Monticello, Rockford, Watertown	$13.00 - $14.00	8%
South Washington County Cable	Cottage Grove, Newport, Woodbury, St. Paul Park, Afton, Grey Cloud Township, Denmark Township	$12.95 - $16.45	27%
Southwest Cable Commission	Eden Prairie Edina, Minnetonka Hopkins, Richfield	$13.95 - $16.95	22%
Twin Cities Metropolitan Area Average		$11.11 - $16.26	46%

State of Connecticut

CLARINE NARDI RIDDLE
ACTING ATTORNEY GENERAL

Office of The Attorney General

55 ELM STREET
HARTFORD, CT 06106
TELEPHONE (203) 566-2026
TELECOPIER (203) 566-1704

May 12, 1989

Senator Howard M. Metzenbaum
Chairman
SubCommittee Antitrust, Monopolies
and Business Rights
Senate Judiciary
Hart Building 308
Washington, D.C. 20510

Dear Chairman Metzenbaum:

I am aware that your sub-committee is investigating the cable industry and the effect the Cable Communications Policy of 1984 has had on consumers.

In the state of Connecticut, consumers have experienced startling increases in basic service rates during the last three years. My office has compiled some statistics supporting the fact that cable rates have skyrocketed since deregulation took effect in January, 1987. I have enclosed our statistics.

There are 26 cable franchisees within the state of Connecticut having a state-wide penetration rate of almost 70 percent of the market. Even though, state law permits more than one cable system per franchise area, there is no head-to-head competition by any cable company within the state. Cable subscribers are unable to choose between competing cable systems and are, instead, required to live with the monopolistic pricing practices of the company servicing their geographical area.

It is our opinion that regulation of basic service rates is required - unregulated monopolies are not in the public interest. If rate regulation is not possible then we need to inject competition into the cable industry by allowing telephone companies to provide cable service within their market area.

Senator Metzenbaum

May 12, 1989

Senator Metzenbaum, I believe that its time to change the rules which the Cable Act imposed on consumers in 1984. It's time to restore to cable consumers the protections from cable's monopoly power which deregulation eliminated.

Thank you for your consideration.

Sincerely,

C N Riddle

CLARINE NARDI RIDDLE
ACTING ATTORNEY GENERAL

Enclosure

CNR:jph

cc: Senator Christopher J. Dodd
Senator Joseph I. Lieberman
Representative Barbara B. Kennelly
Representative Sam Gejdenson
Representative Bruce A. Morrison
Representative Christopher Shays
Representative John Rowland
Representative Nancy L. Johnson

Cable Television Basic Rates In Connecticut
Since Full Rate Deregulation on January 1, 1987 -
Does Not Include Automatic 5% Increases Allowed in
1984 and 1985 Per Cable Act

Company	1986 Eff.* Rate	1987 Eff. Rate	1988 Eff. Rate	1989 Eff. Rate	Percentage Increase From 1986
Cablevision of CT	13.20	19.95	19.95	19.95	51.10
Cablevision of So CT	12.35	19.95	19.95	19.95	61.50
Century Cable Mgmt.	10.46	12.50	12.50	15.50	48.20
Century Norwich	11.38	12.50	14.15	16.75	47.20
Comcast-Danbury	13.15	14.95	15.95	18.95	44.10
Comcast-Middletown	13.95	14.95	16.95	16.95	21.50
Continental					
expanded		12.40	14.40	14.40	13.80
basic	7.65	7.65	7.65	7.65	0.00
broadcast	not offered		7.65	7.65	0.00
economy	2.15	2.15	2.15	2.15	0.00
Cox Cable of Greater Hartford	13.18	14.95	16.25	17.25	30.90
Eastern Connecticut Cable Television	9.85	11.25	2.95	15.00	52.30
Haystack	12.55	15.95	15.95	17.95	43.00
Heritage (Rollins)	13.75	14.95	16.85	18.15	32.00
Housatonic Cablevision	15.75	17.95	18.95	18.95	20.30
Laurel Cablevision	7.65	12.95	13.95	17.95	134.00
Mid-Connecticut	15.70	17.95	18.95	18.95	20.70
New Milford Cablevision	15.75	17.95	18.95	18.95	20.30
Northwest Cable	15.95	15.95	15.95	17.95	12.50
Storer-Clinton	12.55	13.75	14.95	15.95	27.10

Storer-Groton	12.50	13.95	14.75	16.25	30.00
Storer-New Haven	11.33	13.95	14.95	14.95	32.00
Telesystems	13.15	14.95	16.10	17.25	31.20
		13.75	15.40	15.40	12.00
Telemedia	10.75	11.50	13.40	13.40	24.60
United Cable - Eastern CT	13.95	15.95	15.95	15.95	14.30
United Cable - Hartford	13.25	13.95	14.90	14.90	12.40
United Cable - Plainville	12.55	13.95	14.90	14.90	18.70
	8.45	8.45		7.20	-17.36
Valley Cable Vision	12.00	13.00	14.00	14.00	16.70
Waterbury Community Antenna (Sammons)	8.09	12.00	12.00	14.00	73.10

(Effective rate = Basic service plus converter charge/month)

**American Home
Satellite Association**

Hans Giner,
President

May 22, 1989

The Honorable
Howard Metzenbaum
United States Senate
140 Russell Senate Office Building
Washington, DC 20510

Dear Senator Metzenbaum:

In connection with your hearing on competitiveness in the cable industry, the American Home Satellite Association would like to express its concerns over the impact the cable industry is having in the home dish industry.

The availability of cable programming to dish owners has long been a major problem for dish consumers. In addition, recent purchases by large cable companies of satellite dish broadcasters -- notably TCI -- have raised fears over the long-term future of our industry. Cable programmers have consistently refused to deal with third-party distributors, and when they do, the distribution requirements are often too onerous. The NRTC is a good example, while some deals were made to allow the sale of programming, they do not have access to all available programming and not at prices comparable to those offered to cable operators. Cable-independent distributors of satellite programming frequently operate as agents, signing the customer up for services then the programmer accesses the customer directly effectively eliminating the distributor.

Many of the programming distribution deals are made among the programmers themselves offering reciprocal distribution rights as incentive for dealing. There continue to be no true third-party distributors of satellite programming to the TVRO market.

The AHSA was established to serve the more than two million dish owners across the country. Their purchase of a satellite dish represents a significant financial investment in order to enjoy a form of basic communications most Americans simply take for granted. Most dish owners live in rural areas that can neither get off-air broadcasts or cable, which others take for granted.

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Bellevue, Washington 98004-5560
(206) 646-8900
FAX #(206) 646-3592

Television today is an essential component of life in our democratic society. Consequently, fair access to television signals must be seen not merely as a privilege to be enjoyed by a fortunate majority, but as a rightful necessity for all. As citizens, taxpayers, and voters, dish owners firmly believe that they have certain rights which are not now adequately guaranteed.

The AHSA provides consumer services such as an approved network of retailers and service centers, testing and review of satellite equipment, and consumer awareness of actions taken by public and private agencies that have an impact on dish owners. The AHSA has also established a legal fund to support its efforts before Congress and the Federal Communications Commission.

I have enclosed some questions which may be useful to you during your hearing. Many of these questions have been asked before but have not been adequately answered. We hope that your hearing will be able to address some of our concerns regarding the cable industry, and look forward to working with you on any legislation.

If you have any questions, feel free to give me a call.

Very best regards,

Hans Giner
President

Enclosures

CC Chris Harvie

American Home
Satellite Association

GOALS AND OBJECTIVES

The American Home Satellite Association is a membership service organization founded and dedicated to protect and enhance the investment that millions of American consumers have made and will continue to make in satellite television technology.

The AHSA will protect consumer rights by undertaking and supporting all actions necessary to ensure that consumers receive a wide variety of satellite programming at fair prices in a competitive marketplace.

To support this objective, the AHSA will:

- Actively support and lobby for passage of the Satellite Television Fair Marketing Act and/or other proposed legislation introduced in the 101st Congress designed to promote fair, equitable and non-discriminatory pricing by satellite programmers.
- Actively participate in proceedings before the FCC exploring discrimination by satellite carriers and the need for uniform scrambling or encryption standards.
- Encourage the adoption of legislation or FCC rules requiring establishment of a satellite emergency broadcast system.
- Encourage and actively support the commencement of congressional inquiries exploring anticompetitive practices in the satellite programmer and cable industries; and re-evaluating the impact upon consumers of the 1984 cable act.

The AHSA will act as a watchdog for consumers' interests by monitoring the practices of satellite programmers, equipment manufacturers, and satellite retailers to ensure that consumers have the opportunity to receive, within the existing legal framework, the widest possible variety of programming, at competitive prices, with reliable equipment.

To support this objective, the AHSA will:

- Establish a network of approved retailers and services centers throughout the United States that satisfy developed standards of reliability and subscribe to a developed code of ethics.

- Conduct independent tests of satellite television equipment and publish evaluations of those tests in periodic objective buyers' guides.

- Monitor the policies and practices of satellite programmers pertaining to direct subscriber terms and conditions (i.e., price, length of subscription, cancellation rights, etc.); promote consumer awareness of those policies and practices; and encourage and support actions by public agencies and private associations to eliminate unfair or discriminatory policies and practices.

The AHSA will enhance consumers' enjoyment of their satellite reception equipment by developing and maintaining membership services designed to: (1) promote reductions in the cost of satellite reception equipment and programming services; (2) promote consumer awareness of commercial and technological changes and developments in the home satellite industry; and (3) assist consumers in resolving technical and legal problems related to the installation and operation of satellite reception equipment.

To support these objectives, the AHSA will:

- Publish and distribute to members a monthly periodical, *Sky Report*, designed to educate and inform consumers about developments and trends in the home satellite marketplace and technology.

- Product a monthly satellite television show "In the Clear", designed to provide all satellite consumers with timely updates of technical, commercial legal and political developments in the home satellite industry.

- Establish and maintain a "help-line" telephone service, staffed by technical experts ready to assist members with questions and problems regarding installation and operation of satellite reception systems.

- Establish and maintain tangible cost savings on equipment and programming by negotiating and making available to members discounts and rebates on satellite equipment and programming, and by establishing the AHSA as a consumer-friendly, independent-of-cable distributor of satellite television programming.

American Home
Satellite Association

Proposed Questions for Senator Howard M. Metzenbaum to be considered in the upcoming hearing on April 12, with representatives for NCTA:

1. Why are more and more cable companies being absorbed by fewer and fewer MSO's, like TCI - a company that now controls one out of five cable subscribers in the U.S. - and like the proposed Time-Warner merger? How can consumers possibly benefit with fewer and fewer cable companies competing for their business?

2. Why are satellite program suppliers continuing to maintain pricing policies that seem on their face to be designed to actively discourage provision of services to the unserved rural and private cable subscribers?
Specifically

a. Why do the programmers continue to charge TVRO distributors more than cable distributors even when those distributors meet volume and credit requirements?

b. Why do most programmers continue to refuse to deal with third party (or non-cable friendly) TVRO distributors or deal with them only on discriminating terms?

c. How do you explain that after the distribution agreement with NRTC, no other cable-independent distributor of programming to the dish owner population has successfully, negotiated distribution agreements?

d. Why do most programmers refuse to deal at all with operators of distribution systems in competition with cable companies (such as wireless cable and SMATV or "private cable")?

e. Why do programmers impose conditions of subscription on dish owners that are never imposed on cable subscribers (eg. minimum non-refundable subscription periods and terms)?

f. Why do most cable owned program providers, such as HBO and Showtime run a free, in the clear, promotional weekend for cable subscribers but rarely for dish owners?

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3. If the programmers are not adopting the above policies out of deference to or fear of their cable company customers (or owners as the case may be), why are they adopting those policies? How does it make sense in a healthy marketplace for a programmer to turn away business?

4. Does the NCTA have a position in the Preferred Communications litigation now pending in Los Angeles? More generally, does the NCTA believe local cable systems should be entitled to exclusive franchises? If it does, why?

5. What true "competition" (i.e. alternative sources of access to satellite delivered programs) does a local cable system have?

6. If local systems continue to be immune from local rate regulation, what factors in the marketplace will control rates?

7. In rural America, direct to home satellite distributed television is the only source of video programming for many Americans. Low cost, Ku-band DBS programming is now rapidly developing in Japan and Europe, making programming readily available to many consumers in areas not served by cable. It is my understanding that the plans by HBO and GE to launch a similar service in the U.S. - the so-called "Crimson Project" - have beem abandoned due to cable operators concerns about the impact of the Ku-band service on their core business. What is the NCTA's position on the provision of DBS Ku-band services?

LAURITZ SANDE HELLAND
ATTORNEY AT LAW

3400 188TH S.W., SUITE 324
LYNNWOOD, WASHINGTON 98037-4711
(206) 775-1880

July 28, 1988

The Honorable Howard Metzenbaum
United States Senate
140 Russell Senate Office Building
Washington, D.C. 20510

Attention: Mary Louise Westmoreland

Dear Senator Metzenbaum:

I represent the American Home Satellite Association, an association organized to advocate and represent the interests of satellite dish owning consumers throughout the United States. I have also represented a number of satellite antenna consumers and retailers directly over the past ten years, including Sid Swartz, President of W.E.S.T., Inc., a retailer who testified before the House Subcommittee on Telecommunications and Finance on June 15, 1988, in support of H.R. 1885 the "Satellite Television Fair Marketing Act."

With this background, I have watched the progress of H.R. 1885 and its companion bill, S. 889, now before your committee, with a considerable degree of interest.

I am familiar with arguments made by the cable television industry, and by satellite programmers controlled by or friendly to cable interests, that a TVRO "marketplace" is working; that satellite programmers will (when the heat is on) negotiate with "non-cable" or "third-party" distributors; that dish-owning consumers, gradually and grudgingly, are being given access (albeit at greater costs) to the satellite programming that cable subscribers take for granted; that nothing is therefore "broken"; and that congressional action in this area is thus unnecessary.

These arguments are illusory. The history of the domestic home satellite industry has been largely the history of a fledging, grass-roots industry and its attempt to inject some element of competition in a market dominated from its inception by large cable companies and the satellite programmers they control or influence.

Consumers owning satellite dish antennas, and the retailers who have served them, have been "pioneers" in every true sense of the word. The earliest pioneers received form letters from major satellite programmers: (1) warning them that they faced civil and criminal penalties and other dire consequences for receiving satellite programs without permission; and (2) advising them that permission to view the programming would not be granted under any circumstance for any price.[1]

When these form-letter threats failed to deter increasing numbers of consumers -- mostly in rural areas -- from buying dish antennas to receive programs taken for granted by their urban cousins, cable systems and satellite programmers began publicly to brand these consumers, and the retailers who served them, as "pirates". Swift and certain retribution was threatened. One large cable and media conglomerate followed through on its threats and, accompanied by a self-generated barrage of publicity and fanfare, it sued a small rural retailer for $10 million in damages and asked for injunctive relief that would have put the retailer out of business.[2]

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[1] In 1982, a mobile home park in rural Western Washington contacted a retailer I represent to purchase equipment and acquire any necessary licenses to install and operate a satellite master antenna television system to provide otherwise unavailable programming to the park's residents. The park was in an area franchised to, but not served by, a cable system and it was located in a poor reception area for broadcast signals. When we contacted the major satellite programmers to inquire about licensing arrangements, we were advised by all of them that permission to view would not be given without clearance from the franchised cable company. We approached the cable company, but were told that it would not under any circumstance: (1) provide cable service to the park; or (2) give the park clearance to negotiate with the programmers for viewing rights. Fortunately, we were able to resolve the matter by persuading county officials to award a franchise authorizing the park to construct a "cable system" to serve the park -- which occupied a single site on one lonely, country road. Armed with this "franchise", we were able to approach the programmers as a "franchised cable company" and the programmers agreed (not without great reluctance) to negotiate viewing rights. While the park and my client were ultimately successful in this adventure, they were able to obtain viewing rights only after investing considerable effort and cost. Furthermore, the time and expense incurred by county officials in awarding a cable television franchise to a territory populated mostly by Holstein cows hardly represented an efficient utilization of public revenues.

[2] The effort was unsuccessful. After the completion of discovery, the district court granted the satellite retailer's motion for summary judgment dismissing the conglomerate's claims with prejudice. AirCapital Cablevision, Inc., et al. v. Starlink Communications Group, Inc., et al., 601 F.Supp. 1568 (D. Kan.

continued on next page

Consumers willing and able to brave these obstacles next found themselves plagued by a crazy-quilt of local zoning regulations that expressly or effectively prohibited or seriously restricted the installation of their antennas.[3] While many of these regulations purportedly have been premised upon aesthetic considerations, it is evident that some communities adopted restrictions primarily to discourage any competition with cable systems.[4] Whether these restrictions were induced by pressure from cable systems or motivated by self-interested desires to increase franchise fee revenues,[5] their effect upon prospective dish owners was the same, and retailers serving communities with restrictive zoning ordinances suffered sharp drops in sales.

When satellite dish sales continued despite these roadblocks, and after Congress recognized the legitimacy of consumer-owned dish antennas by adopting the viewing rights provisions of the Cable Communications Policy Act of 1984,[6] the satellite programmers, led by HBO, began to scramble their signals.

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continued from previous page

1985).

[3] An ordinance in Puyallup, Washington, which is still on the books to the best of my knowledge, requires dish antennas (and *only* dish antennas) to be set back, from each property line, a minimum of ten feet *for each foot* of dish diameter. Because dish antennas in Western Washington must be 8-10 feet in diameter to obtain adequate reception, a lot owner will have to provide close to one acre of set back to get a dish permit. I am unaware of many lots in Puyallup other than the Western Washington Fairgrounds that will be able to comply with this requirement.

[4] Plantation, Florida for example, adopted an ordinance requiring prospective dish owners to obtain the local cable company's approval as a precondition to securing an installation permit. Chicago's ordinance (which one alderman admitted was enacted to create a favorable atmosphere for cable) imposed stringent almost impossible procedural requirements on satellite dish installations. *See* *In re Preemption of Local Zoning*, (C.C. Docket No. 85-87), 51 Fed.Reg.5519 (February 14, 1986); Comments and Reply Comments of Satellite Television Industry Association (SPACE) (filed in C.C. Docket No. 85-87).

[5] Local governments are authorized to charge cable systems franchise fees not exceeding 5% of the systems' gross revenues. *See* 47 U.S.C. § 542(b). A dish owner may have less incentive to subscribe to a local cable service. Thus, an increase in the number of dishes in a community may result in a loss of cable subscribers and, therefore, a loss in franchise fee revenues.

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Few would dispute the legitimacy of a programmer's attempt to take reasonable steps, including scrambling, to protect its signal and obtain fair compensation from its viewers. The scrambling that began in early 1986, however, was accompanied by a nationwide blitz of "the skies are going dark" advertisements, many of them financed by local cable companies,[7] and negative articles and stories appearing in major newspapers and network television broadcasts.[8]

The effect of this publicity on the consumer satellite dish industry has, from my perspective, been disastrous. A number of dish retailers I have represented have gone out of business and one of my clients estimates that more than one-half of the retailers in Western Washington have closed their doors in the last three years.

Those hardy retailers that remain have the onerous task of convincing consumers that it makes any economic sense at all to purchase satellite reception equipment as a means of receiving satellite programming. In addition to making a substantial investment in basic reception equipment, a consumer today must pay an additional $400 to purchase an authorized decoder and then must agree to pay inflated and discriminatory prices to acquire viewing rights for even a minimal compliment of basic and premium program services. A recent study undertaken by the American Home Satellite Association offers empirical proof that the average pay satellite service charges TVRO customers 15% more than it charges cable subscribers; that basic satellite programming services charge TVRO customers 55% more than cable subscribers are assessed; and that, when all costs are considered, satellite dish owners pay 158% more in annual costs than cable customers pay to receive the same programming.[9] A consumer willing to make this large investment is given absolutely no assurance that he or she

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[6] Pub. L. 98-549, Sec. 5. Now codified at 47 U.S.C. §§ 605(b)-(e).

[7] Many of these ads, although appearing in different parts of the country, were suspiciously similar. They featured the internationally recognized circle and red diagonal bar superimposed on a picture of a dish antenna and stressed that consumers would be wise to contact their cable companies before investing in a useless product.

[8] ABC News, for example, broadcast a report during this period concluding that consumer-owned dishes would soon be useful only for scrambling eggs.

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will not be required to expend additional time and money to do battle with local zoning authorities.[10]

Many consumers faced with these prospects may conclude that it would be simpler and cheaper to subscribe to their local cable television systems, and thus will help to strengthen and perpetuate the increasingly unregulated monopolies cable television systems are building in cities and towns throughout the nation.[11] Unhindered by any competition from alternative program delivery systems,[12] and increasingly freed (by conscious decision and Constitutional fiat) from the burden of any governmental regulation, cable television systems are dangerously close to developing an uncontrollable oligopoly over what is rapidly becoming the most important medium of communication in this nation.

It is evident that some limited governmental regulation of this "marketplace" is imperative.

S.889 is a reasonable piece of legislation that will help (with minimal governmental intrusion) to alleviate some of the predatory practices and anticompetitive conditions that have produced the current state of affairs. The bill would prohibit the scrambling of most publicly-supported PBS and AFRTS programming,

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[9] A copy of this study is enclosed.

[10] Although the F.C.C. adopted a rule in 1986 that preempts ordinances that discriminate against and restrict satellite antenna installations, see 47 CFR § 25.104, many communities apparently are ignoring the rule and there are between 50-100 legal challenges to prohibitive ordinances currently pending. See, "A Jarring Debate: Rights of Owners" New York Times, July 27, 1988, p. 16.

[11] An alarmingly growing number of consumers, frustrated by discriminatory prices and nonavailability of programming in the legitimate market, are being persuaded to enter the black market and purchase decoders illegally modified to receive encrypted programming without authorization. If this practice continues to grow the entire fabric of the legitimate TVRO marketplace could be torn asunder. See the written testimony of Sid Swartz presented to the House Telecommunications subcommittee on June 15, 1988. A copy of this testimony is enclosed.

[12] Another new fledgling industry trying to develop a competitive program distribution system, MMDS or "wireless cable", is now encountering stiff and anticompetitive opposition from cable television companies and the programmers controlled by or friendly to them. See Wireless Cable Ready to Grow, Broadcasting, Oct 5,

continued on next page

and would require the development (with FCC assistance) of a uniform national encryption (or scrambling) standard. Most importantly, the bill would require programmers who scramble to make their programming available to home satellite users upon nondiscriminatory prices, terms and conditions.[13] The bill would require the FTC to conduct an investigation of the predatory practices in this area, and would require the FCC to initiate a rulemaking to facilitate the delivery of network television programming to areas not served by broadcast affiliates.

S.889 will accomplish much of what needs to be accomplished with limited governmental involvement. If Congress does not act now, and if the predatory practices of the cable television companies and satellite programmers are allowed to continue, stronger, costlier and more intrusive legislation will be needed in the

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continued from previous page

1987, at 46 (copy enclosed). Much of this opposition resembles the resistance that consumer dish owners and SMATV operators have encountered for years.

[13] I understand that, immediately following the House Telecommunications subcommittee's mark-up and vote on H.R. 1885, some of the programmers entered into distributor agreements with one or more rural telephone or cooperative associations, and that cable interests are now arguing that these agreements remove the necessity for any legislation. While any programmer agreement with truly independent distributors is laudable (even agreements negotiated in the limelight of publicity generated by congressional investigation of this problem), it is not clear whether these agreements will generate cost savings to consumers or produce any real competition in this area. Furthermore, the agreements will have no impact for the great majority of dish owning consumers that cannot be served by the rural co-ops.

near future to dismantle a powerful and entrenched monopoly.[14] I strongly urge your support of this legislation.

Very truly yours,

Lauritz S. Helland

cc: Hon. Brock Adams
Hon. Dan Evans

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[14] The current trend in the cable and programmer industries is that the big are getting bigger. Tele-Communications, Inc., the nation's largest cable company, has been on a buying spree since 1983, when it bought out a couple of medium-sized cable companies (Liberty and Tele-Media) and began assuming control of a large number of Group W's cable systems in the West. In 1986, TCI acquired a controlling interest in United Artist Communications (which in turn bought out Daniels & Associates, a 380,000 subscriber MSO, in February of this year). TCI was the leader in the $576 million bail-out of Turner Broadcasting System that gave a consortium of cable operators a 49% equity interest in TBS. TCI itself owns 10.1% of TBS and is assured a seat on the TBS board. In November 1987, TCI bought out Tempo Enterprises, which includes among other subsidiaries the common carrier delivering the WTBS satellite signal. In that same month, TCI launched its Netlink U.S.A. service, one of the few distributors currently authorized by programmers to deal with dish-owners. TCI is currently seeking F.C.C. authority to establish a DBS service utilizing two 16 channel, 100-Watt satellites. This request is generating significant opposition because of TCI's track record of anticompetitive activities. See Communications Daily, June 21, 1988 (some observers believe that TCI ultimately plans to combine its Netlink and Tempo subsidiaries and attempt to dominate the KU-band DBS market if and when that market develops). In addition to its Tempo Television Service, TCI also owns a percentage of The Discovery Channel, and it has recently been courting Viacom and attempting to buy all or a piece of Showtime/The Movie Channel. There is virtually no facet of the cable and satellite programming industries that TCI doesn't have its tentacles into. One out of every five cable subscribers in the United States is plugged into a TCI-controlled system (twice as many as TCI's closest competitor), TCI is reported to have more than $14 billion in assets and to have generated more cash flow last year ($850 million) than all three broadcast networks combined. See "The King of Cable TV", Business Week, October 26, 1987, p. 85. Meanwhile, the number two cable operator, American Television & Communications (owned by Time-Life which also owns HBO and Cinemax) is contemplating a merger with Warner Communications, Inc. (Broadcasting, July 25, 1988, p. 86).

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A COMPARISON OF CABLE AND TVRO ECONOMICS

Executive Summary

There are two ways for consumers to access satellite programming—either by subscribing to cable television or by owning a home satellite antenna system and purchasing programming directly from the program suppliers or their distributor/agents. This paper analyzes the economics of each option and compares the costs to the consumer of purchasing programming as a home satellite owner to those of purchasing programming as a cable subscriber.

The economic analysis of the consumer costs points to the following conclusions:

- When all costs are considered, the TVRO owner pays 158% more in annual costs than a cable customer does to receive the same satellite programming.
- The average basic cable network charges TVRO customers 55% more for the same service they provide cable customers.
- The average pay cable network charges TVRO customers 15% more for the same service they provide cable customers.
- Most cable networks refuse to deal with third-party TVRO distributors, treating them instead as "agents" and taking over their customer lists after the initial sale has been made.
- Basic cable networks charge TVRO distributors (or agents) an average of 712% more than they charge cable operators.
- Premium cable networks charge TVRO distributors (or agents) an average of 48% more than they charge cable operators.

While cable networks are placing a heavy surcharge on program pricing for the TVRO market, they do not incur significant incremental costs in the sales and servicing of TVRO customers. The current pricing policy results in discrimination against TVRO consumers and places a significant economic obstacle in the way of equal access to satellite programming for many Americans.

Program suppliers should restructure their pricing policies to allow third-party TVRO distributors to operate in the TVRO market, and make the same volume discounts that are available to cable operators available to TVRO distributors. A satellite programming pricing policy that provides equal access at fair cost to all consumers will deliver increased subscribers and improved operating margins to both the TVRO industry and the satellite programming industry.

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Introduction

The purpose of this paper is to provide an analysis and discussion comparing the relative economics of satellite-delivered programming for cable subscribers and for consumers who own home satellite antenna systems (TVRO systems). We will examine these economics from two perspectives: that of the consumer and that of the program provider.

There are two ways for satellite-delivered entertainment and information programming to be distributed to consumers: 1) via cable lines owned and maintained by cable operators, and 2) via TVRO systems owned and maintained by individual consumers. For the most part, cable customers and TVRO consumers access exactly the same programming via satellite. In the following sections of this report, we will describe the logistics of purchasing satellite programming as a cable subscriber and as a TVRO owner, and examine the costs involved in each option.

In addition to looking at the consumer issues in satellite program economics, we will examine the economics from the point of view of the third party distributor—the cable operator and the would-be TVRO distributor.

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Consumer Economics

TVRO Customers

As of March 31, 1988, approximately 17% of American TV households had no access to cable television signals.[1] For these (primarily rural) Americans, TVRO equipment is the only means available for reception of satellite programming. In fact, many of these same consumers do not have access to any off-air network programming because the broadcast signals are not strong enough to reach their rural locations. In these very rural areas, a consumer must have a TVRO system to receive any entertainment or informational programming at all. The ability to access satellite programming is necessary for these consumers to stay in touch with the country and the world.

A consumer who does not have access to broadcast or cable-delivered programming, or who prefers not to deal with a cable operator, must purchase and maintain a home TVRO system and deal directly with the satellite program provider (for example HBO, ESPN, etc.) or a third-party distributor/agent in order to receive scrambled satellite programming. Unscrambled satellite programming, or programming transmitted "in the clear", can be received by a TVRO system without dealing with any program providers. Programming transmitted "in the clear", however, is becoming scarce. Almost all programming of interest to consumers is either scrambled or is scheduled to be scrambled in the near future.

Currently, complete home TVRO systems range in initial cost from $2,000 to $3,500. As recently as 1984, the average cost of a complete TVRO system ranged from $5,000 to $7,000. Many of the consumers who purchased these systems several years ago are still making installment payments for the equipment. In addition to the installment payment and interest costs, the consumer incurs on-going maintenance expenses. We estimate these annual maintenance costs to average $150 per year. The cost of purchasing scrambled programming is incremental to these hardware costs. Table 1 outlines the economics of purchasing and maintaining a TVRO system.

Once a consumer has installed the TVRO equipment and connected it to a television set, he is able to receive any satellite programming that is delivered "in the clear". In order to receive scrambled programming, the consumer must own either a stand-alone decoder or an "IRD" with the decoder built into the TVRO receiver. The consumer deals with either a third-party program distributor/agent or with the program provider directly to arrange for the purchase of the rights to view the scrambled programming. Many TVRO equipment dealers also act as programmer agents and sell programming directly to consumers. Once the programming purchase has been arranged, the program provider "authorizes" the consumer's descrambler to receive the scrambled programming. Authorization is accomplished via a data stream transmitted to the consumer's decoder.

Table 2 lists the programming that is typically available in a cable system and specifies which programming is scrambled. Tables 3 and 4 list the annual cost of purchasing scrambled programming for TVRO owners, cable operators and cable subscribers.

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[1] Paul Kagan Associates, Inc., "Cable TV Programming," March 22, 1988, No. 119, 11.

Cable Customers

As of 1988, approximately 83% of U.S. households lived in areas wired for cable television. A consumer living within a cable franchise has the opportunity to purchase entertainment and information programming directly from a locally franchised cable operator. The cable operator, who has been granted a "franchise" by local government to provide cable-delivered programming, has constructed a cable plant that receives program signals from various satellites and delivers the signals throughout the franchise area. The signals received by the cable operator are, for the most part, identical to the signals received by home TVRO systems. Each home "passed" by cable can be wired to receive the programming directly from the cable system's "head-end"—the location of the cable operator's antennae and satellite reception equipment.

The cable customer pays an initial installation fee of about $30 (often this installation fee is waived in cable sales promotions) and a monthly fee for reception of the programming of their choice. Frequently the cable subscriber is also required to pay a refundable deposit of about $50 for the cable converter provided to them by the cable operator.

Most cable systems offer a "basic" package consisting of all the local network affiliates, local independent and PBS stations, one or more "superstations" (WTBS, WOR, WGN), and several cable exclusive networks (MTV, Lifetime, ESPN, CSPAN, CNN, etc.). Table 2 lists the channels included in a typical cable system line-up. The average monthly charge for a basic cable service is $13.10.[2]

Cable customers also have the option of receiving at least one "premium" or "pay" service. Cable operators charge for the premium services (HBO, Showtime, Disney, Playboy, etc.) on a per-channel, per-month basis. The current average monthly charge for a pay service as of April 1988 is $10.20.[3] Second and third pay services purchased by cable customers are generally discounted to about $9.00 per month.

Cable vs. TVRO—The Consumer Costs

Table 1 on the following page illustrates the relative costs of purchasing satellite programming from the perspectives of the cable subscriber and the TVRO consumer. All figures are annual. Please note for consumers who purchased TVRO systems several years ago, the purchase and depreciation costs will be much higher. Identical programming purchases (to the extent possible) are assumed for cable and TVRO consumers.

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[2] Paul Kagan Associates, Inc., "Marketing New Media," April 21, 1988, No. 61, 1.

[3] Ibid.

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Table 1

Consumer Economics

	Cable Subscriber	TVRO Owner
Initial Costs:		
Equipment purchase	$ 0	$ 3,000.00
Installation	30.00	500.00
Converter deposit (refundable)	50.00	0
Total Initial Costs	80.00	3,500.00
On-Going Costs:		
Maintenance	0	150.00
Programming:		
Basic Channels[4]	157.20	243.85
Premium Channels[5]	230.40	179.55
Total Programming	387.60	423.40
Depreciation:[6]	0	428.57
Total Annual Costs	$387.60	$ 1,001.97
Total First-Year Costs	$467.60	$ 4,501.97
TVRO Surcharge % (annual cost):		158%

This breakdown of the relative consumer economics of cable subscription and the purchase and maintenance of a home satellite antenna system clearly shows the pricing penalty paid by home dish owners. Not only are dish owners required to make an average upfront investment of over $3,500, but the programming they purchase—in particular, basic network programming—costs more than the comparable programming for a cable subscriber. On top of this, the TVRO owner has annual maintenance and depreciation costs of over $578 for his TVRO system. *When all costs are considered, the TVRO owner pays about 158% more in annual operating costs than a cable customer to receive the same satellite programming.*

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[4] Basic programming cost from Table 3—"Annual Programming Costs - Basic Channels".

[5] Cost of one year of two premium channels. Cable sub pays for the first channel at $10.20 per month, the second at $9.00 per month. TVRO owners purchase a combo package of HBO and Cinemax at $179.55 per year.

[6] Depreciation costs use the straight-line method assuming a seven-year life for the satellite reception equipment.

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Table 2

Typical Cable System Program Offering

Basic Package

NBC Affiliate (local or regional)[7]
ABC Affiliate (local or regional)
CBS Affiliate (local or regional)
* PBS[8]
Local Independent
Regional Programming
Local Origination Programming
Community Programming (Education, City Affairs)
The Weather Channel (to be scrambled)
The Nashville Network (to be scrambled)
* Nickelodeon (and Nick at Nite)
Arts and Entertainment
HVN (or similar shopping channel)
* American Movie Classics
The Discovery Channel (to be scrambled)
Black Entertainment Television
* ESPN
* CNN
* CNN Headline News
* WTBS
* USA
* MTV
* Lifetime
* CBN
Financial News Network
* WOR
* WGN
The Fashion Channel
* VH-1
The Learning Channel

Premium Channels

* HBO
* Showtime
* The Movie Channel
* Cinemax
* Disney
* Playboy

This channel line-up assumes a 36-channel system with no blank channel capacity. Depending on the cable system plant type and capacity, cable operators can offer anywhere from 12 to 120 channels, increasing in increments of 12.

* Programming is scrambled and cannot be received by TVRO owners without authorization. TVRO owners are authorized to receive the service after paying a (usually annual) service charge.

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[7] At this time, some network feeds are being transmitted in the clear. All of the network feeds are expected to be scrambled in the near future.

[8] While the PBS feed is not scrambled, viewing PBS feeds requires the consumer to have a decoder. At this time, one PBS feed is transmitted in the clear occasionally.

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TVRO Retail Economics

Much of the basic programming available to TVRO owners is packaged and either not available a la carte, or very expensive when purchased as a single channel. In order to make the cable and TVRO basic program line-ups as comparable as possible, we have assumed that the TVRO owner example in Table 3 has purchased in addition to some a la carte services, the "Extraview" package of 12 basic channels for an annual cost of $120.00. The channels included in the "Extraview" package are marked as "Exvw" and priced within that package. It is important to note that "Extraview" is available for $54.00 per year if the TVRO owner purchases Showtime and The Movie Channel for $186.00 per year with the Extraview package.

The rest of the basic channels included in the line-up are priced as if they were purchased on an a la carte basis. The number and type of basic channels duplicates (to the extent possible) a "typical" cable system basic package. Because every cable system differs in the programming offered in its basic package, it is impossible to make exact comparisons between cable and TVRO offerings.

Tables 3 and 4 point out that program suppliers are charging their TVRO customers an average of 55% more for basic programming and 15% more for premium programming than they are charging cable subscribers.

The most obvious justification for such a surcharge is the additional administrative work required to handle authorization and billing for individual customers as opposed to entire cable systems (who handle their own billing and authorization). Additionally, the program suppliers can argue that the bad debt problem will be greater with individual accounts as opposed to cable system accounts. Cable systems are not only more likely to be able to pay their bills in a timely fashion, but have greater motivation to pay, as they cannot afford to have any service cut off, leaving their subscribers without programming.

The program supplier has two arguments in favor of higher charges for the individual TVRO subscriber—additional administrative work and greater bad debt expenses. The question becomes then, how much surcharge covers the additional expenses and how much is simple price gouging? Given that the majority of program suppliers require TVRO subscribers to pay in advance for the service on an annual basis (while cable systems are billed monthly) and therefore have to deal with the TVRO owner only once annually, the incremental administrative costs are relatively small. To be generous, we will assume that the incremental cost to the program supplier averages $5.00 for the billing and authorization of one customer annually.

Bad debt expense in a well-managed cable system typically runs about 2% of gross revenues. For purposes of conservatism, let's assume that TVRO customers are more likely to run up bad debt expense, and that average TVRO bad debt is 5% of gross revenues. (This assumption is very arguable. If most TVRO customers are paying annually in advance, bad debt should be almost zero.)

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Table 3

Annual Programming Costs — Basic Channels

	TVRO Consumer[9]	Cable Operator[10]	Cable Subscriber[11]
NBC[12]	$ 49.95	$ 0	
CBS	0	0	
ABC	0	0	
PBS	0[13]	0	
Local Independent	0	0	
Regional Programming	0	0	
Local Origination	0	0	
Community Programming	0	0	
ESPN	Exvw	3.36	
CNN	Exvw	3.36	
CNN Headline	Exvw	free with CNN	
WTBS	19.95	1.20	
USA	Exvw	1.56	
MTV	Exvw	2.64	
CBN	Exvw	0.72	
Lifetime	Exvw	1.20	
The Weather Channel	0	1.118	
The Nashville Network	Exvw	1.80	
Nickelodeon	Exvw	2.64	
Arts & Entertainment	0	1.20	
VH-1	Exvw	free with MTV	
Home Value Network	0	[14]	
The Fashion Channel	0	0	
American Movie Classics	29.95	3.00	
WOR	12.00[15]	1.20	
WGN	12.00[16]	1.20	
The Discovery Channel	Exvw	.60	
Financial News Network	0	.42	
Black Entertainment Television	0	.36	
The Learning Channel	Exvw	.60	
Extraview Package (TVRO only)	120.00	N/A	
Total Cost of Basic Channels	$243.85	$30.816	$157.20[17]
TVRO Owner Surcharge	$ 86.65		
TVRO Owner Surcharge %	55.1%		

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[9] Based on advertised retail rates for TVRO consumers in June satellite TV guides.

[10] License fees are top-end (without discounts) as estimated by Paul Kagan Associates, Inc., "Cable TV Programming," May 19, 1988, No. 121, 7.

[11] Cable subs do not pay for individual channels, but are charged a single monthly fee for the entire basic package. Average annual basic fee is $157.20 ($13.10 X 12).

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Table 4

Annual Programming Costs — Premium Channels

	TVRO Consumer[18]	Cable Operator[19]	Cable Subscriber[20]
HBO	$155.40	$46.80	$122.40
Cinemax	155.40	46.80	122.40
Showtime	131.40	43.08	122.40
The Movie Channel	131.40	43.08	122.40
Disney	89.40	34.56	122.40
Playboy	131.40	42.60	122.40
Average TVRO Owner Surcharge[21]		$18.60	
Average TVRO Owner Surcharge %[22]		15.2%	

Table 3 Footnotes (Continued)

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12 Assumes TVRO customer purchases all three scrambled network feeds (WABC, WBBM, and WXIA) from Primetime 24.

13 TVRO customer required to have a decoder, but no program fee is charged.

14 Shopping channels generally do not charge a license fee but actually pay the cable operator a percentage of revenues in exchange for carriage.

15 Only available in "Skyline Silver" package with KTLA and WSBK at $36.00 per year. For comparison, we have dropped KTLA and WSBK from the price and charged $12.00 per year. Note that the consumer cannot purchase a single channel from this package.

16 Only available in "Superstar Connection" package with KTVT and WPIX at $36.00 per year. For comparison we have dropped KTVT and WPIX from the package and charged $12.00 per year. Note that the consumer cannot purchase a single channel from this package.

17 Average annual charge for basic cable service ($13.10 X 12). Kagan, "Marketing New Media," No. 61.

Table 4 Footnotes

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18 Based on advertised retail prices in June satellite TV consumer magazines for consumers purchasing a single "premium" programming service. Discounts are often available for consumers purchasing more than one premium service at a time. For example, HBO and Cinemax in combination are $179.55 per year, and Showtime and The Movie Channel are $186.00 per year in combination.

19 Drawn from figures published in Paul Kagan Associates, Inc., "The Pay TV Newsletter," April 29, 1988, No. 326, 3.

20 Average pay service at $10.20 per month. Paul Kagan Associates, Inc., "Marketing New Media," April 21, 1988, No. 61, 1.

21 Averages do not include Disney rates, as the current Disney price is a short-term introductory special giving two free months.

22 *Ibid.*

In order to compare some real numbers, we will use the Viacom package "Extraview" for an example. Extraview provides the TVRO owner with 12 basic channels (see Table 3) for $120.00 per year ($54.00 per year if purchased with Showtime and The Movie Channel at $186.00 per year). At five percent of gross revenues, the average bad debt per TVRO customer purchasing Extraview is $6.00 per year.

Revenue per TVRO subscriber		$ 120.00	
Average basic surcharge percent (Table 3)		55%	
Average surcharge per TVRO sub			$ 66.00
Average bad debt expense	$6.00		
Average incremental admin. exp.	5.00		
Total incremental expense			11.00
Additional TVRO profit per sub			$ 55.00

The program supplier is earning incremental profit of approximately 37% of gross revenues with TVRO customers. Because there are no middlemen when the program packager deals directly with the TVRO subscriber, and because the studios receive the same amount of revenue whether the customer is cable or TVRO, all of the incremental revenues of $55.00 fall directly to the program supplier bottom line.

Cable Operator Economics

Tables 3 and 4 illustrate the programming costs for the cable operator to provide basic and pay services to cable customers. Pay programming expenses represent about 35% of pay cable revenues, while basic programming expenses run about 20% of basic cable revenues. In addition to programming costs, cable revenues cover plant maintenance and depreciation costs, sales and marketing expenses, as well as administrative and billing costs. An average cable system runs with approximately a 20-30% operating margin after these costs.

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Program Supplier Economics

For purposes of this discussion, the "program supplier" is the party that actually packages program material (movies, sports events, news, original and syndicated programs, etc.) and distributes it via satellite. Generally speaking, the program supplier also contracts with and pays license and copyright fees to studios for program product and often produces original programming. Home Box Office (HBO), Showtime, ESPN and MTV are examples of program suppliers.

In making a comparison of cable and TVRO economics from the program supplier perspective, we will focus on surveying actual prices charged cable operators and third party TVRO distributors to determine whether a pricing distinction is being made between the two classes of customers.

Third-Party TVRO Distributors

TVRO distributors are to TVRO consumers what cable operators are to cable customers. These middlemen package, advertise, and sell satellite programming to consumers with TVRO systems. Full service distributors provide advertising, sales support, billing and authorization of customer descrambling equipment. In exchange for this support most program suppliers are willing to give TVRO distributors a discount off regular TVRO retail pricing. The individual distributor chooses how much, if any, of the discount will be passed along to their retail customers.

In actual fact, there are very few true third-party distributors. Program suppliers, for the most part, have discouraged potential distributors from starting businesses by refusing to deal with them as true distributors. Except for one or two basic cable networks, most program suppliers deal with would-be distributors as "agents." The distinction between an agent and a distributor is that the agent is considered a contract employee of the program supplier, and therefore receives a commission for the sale of programming to TVRO consumers. After the initial sale, the program supplier takes over the new TVRO customer, and the agent is no longer allowed to deal with that consumer.

True distributors purchase blocks of programming (typically 500 subscriptions at a time) at wholesale prices and resell them to consumers. The distributor becomes the primary programming source for consumers, providing a "one-stop shop" at which they can purchase programming from any source and consolidate all programming purchases into one bill. Distributors often also sell TVRO equipment, including decoders.

Relative Service Charges

The relative service charges of several program suppliers for cable operators and TVRO distributors are outlined in Table 5. The program suppliers listing is not intended to be a comprehensive catalog, but to represent as much as possible those programmers who supply identical program packages to both cable and TVRO purchasers. For purposes of conservatism, the rate cards used to estimate license fees paid by cable operators are top-end, with no volume discounts assumed. Large MSOs (multiple system operators) receive a volume discount of as much as fifty percent of these prices. The impact of these volume discounts on Table 5 would be to substantially increase the surcharge amount for TVRO customers.

Table 5 illustrates the pricing differentiation between cable operators and TVRO distributors. The TVRO distributors pay an average of $18.27 per year of service per customer more than the cable operators pay for the same service. This represents an average TVRO surcharge of over 493% of cable prices.

It is interesting to note that it is the basic cable networks who are charging TVRO distributors and agents the highest monthly fee relative to cable operator fees. Basic cable networks, because they have advertising revenue in addition to license fees, traditionally are much less expensive for cable operators to carry. ESPN, for example, charges TVRO operators 644% more than cable operators for the same service.

Premium program suppliers, while still charging TVRO distributors a surcharge, have an average mark-up of 48% for TVRO compared with the average basic TVRO mark-up of 712%.

If one accepts the thesis that TVRO distributors are providing the same services to the program supplier that the cable operator provides, i.e., billing, authorization, advertising and delivery of a certain volume of subscribers, it is difficult to find an economic justification for a differential pricing policy. Programmers have absolutely no incremental costs in selling programming through TVRO distributors. Because the cable operator rates outlined in Table 5 do not include volume discounts, there is no reason why TVRO distributors would fail to qualify for the rate by not providing sufficient customer volume.

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Table 5

Annual Service Charge Comparison
Cable Operator vs. TVRO Distributor

Premium Program Supplier	Cable Operator[23]	TVRO Distributor[24]	Surcharge Amount	Surcharge Percent
HBO	$ 46.80	$ 62.27[25]	$ 15.47	38.46
Cinemax	46.80	62.27[26]	15.47	38.40
The Movie Channel	43.08	70.50[27]	27.42	71.87
Showtime	43.08	70.50[28]	27.42	71.87
Disney	34.56	N/A[29]	N/A	N/A
Premium Averages[30]	$ 44.94	$ 66.38	$ 21.44	47.71%
ESPN	$ 3.36	$ 25.00	$ 21.04	644.05
CNN	3.36	15.25	11.89	353.87
WTBS	1.20	11.00	9.80	816.67
USA	1.56	7.20	5.64	361.54
CBN (a la carte)	0.72	10.20	9.48	1316.67
WOR	1.20	8.00[31]	6.80	566.67
WGN	1.20	8.67[32]	7.47	622.50
Home Sports Enter	6.00[33]	66.78	60.78	1013.00
Basic Averages	$ 2.32	$ 19.01	16.69	711.87%
Combined Averages	$ 16.53	$ 34.80	$ 18.27	492.97%

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[23] License fees are top-end (without discounts) of programmer rate cards as estimated by Paul Kagan Associates, Inc., "Cable TV Programming," May 19, 1988, No. 121, 7. Large cable operators receive discounts of up to 50% off the top-end rates.

[24] Price charged a typical third-party TVRO distributor/agent.

[25] Assume combination purchase of HBO and Cinemax. Distributor not allowed to purchase individual channels.

[26] *Ibid.*

[27] Assumes combination purchase of The Movie Channel and Showtime. Distributor not allowed to purchase individual channels.

[28] *Ibid.*

[29] Disney will not sell through third-party distributors.

[30] Averages do not include Disney, as that service is not available for distribution by third parties.

[31] Only available in "Skyline Silver" package with KTLA and WSBK. Package price for all three services is $24.00.

[32] Only available in Superstar Connection package with KTVT and WPIX. Package price for all three services is $26.00.

[33] Home Sports Entertainment is a new service. Cable operator price is estimated.

American Home
Satellite Association

Summary

TVRO customers are, for the most part, Americans of modest means who live in rural parts of the country where television programming is scarce or not available at all. These consumers are willing to make a significant initial investment in satellite reception equipment in order to have access to the same programming available in the rest of the country. Despite the fact that these consumers purchase and maintain the same equipment (on a smaller scale) as cable operators, program suppliers are charging them substantially more than cable customers for the same satellite programming.

Program suppliers generally make discount prices available to third-party distributors who package and administer individual TVRO customers, but the discount is substantially less than the discount a cable operator would receive for providing the same volume of cable customers. Further, very few programmers are willing to deal with potential third-party distributors as true wholesalers of their product, but instead treat them as agents, selling for a one-time commission. Because of their refusal to deal with distributors and the heavy mark-up placed on TVRO pricing, program suppliers are getting a much bigger piece of the TVRO revenue pie without incurring comparable increases in costs.

Whether viewed from the consumer perspective or from the perspective of the program supplier, it is evident that TVRO consumers are being discriminated against by having to pay significantly more for satellite programming than their cable counterparts. Although program suppliers who deal directly with consumers do incur more administrative and handling costs, the suppliers are charging the consumers a much higher price than is warranted by the incremental handling costs.

There is no economic justification for discriminating against TVRO distributors and consumers with a pricing policy that charges the TVRO consumer substantially more for exactly the same programming received by cable customers. Program suppliers should restructure their pricing policies to allow third-party distributors to operate in the TVRO marketplace, and make the same volume discounts that are available to cable operators available to TVRO distributors.

By revising pricing policies and allowing third-party distributors to operate in the TVRO market, program suppliers will have effected a satellite programming policy that provides equal access at fair cost to all consumers and that will deliver increased subscribers and improved operating margins to both the TVRO industry and the satellite programming industry.

419 PARK AVE. SOUTH
NEW YORK, NY 10016
(212) 696-1221
800-635-9364
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SALES & AFFILIATE RELATIONS
FAX: (212) 481-1996

HOME-DISH
HOME DISH
SATELLITE NETWORKS, INC.

CREATIVE SERVICES
(ADVERTISING, MEDIA RELATIONS,
PROGRAMMING & PRODUCTION)
(212) 696-1434
800-237-0966
FAX: (212) 779-4155

ROBERT KRAMER
Executive Vice President
Chief Financial Officer

May 19, 1989

Chris Harvie
Office of the Honorable Howard Metzenbaum
Senate Anti-Trust Committee
308 Hart Senate Office Bldg.
Washington, DC 20510

Dear Chris:

With recent cable anti-trust developments, and specifically the charges Viacom has leveled at HBO/Time, Inc., it should become increasingly clear that there exists a very real problem within the cable marketplace. Our own problems lie in the restriction of trade related to the movie companies and movie product; we are unable to acquire cable "exclusive" movie product for our fledgling satellite channel, StarDust Theatre. Similar to us, Viacom claims to be suffering because of an inability to compete on a fair basis. So while "exclusivity" may have originally been a financial play intended to secure quality film product for the purpose of a "competitive edge" it has finally gridlocked the programming marketplace stagnating all of Pay-TV. This situation requires immediate government action, as it continues to expand beyond the cable market.

Cable's vertical integration involves three element(s): (1) The movie studios, as product provider, (2) The packager/programmer of this product (such as HBO) and (3) The forum for Pay-TV distribution - the cable system itself.

While it is possible for these three crucial elements to exist harmoniously even under one corporate banner, there is an intrusive factor that singularly sustains the current anti-competitive behavior - "exclusivity". Should a packager/programmer secure an exclusive relationship with both product suppliers and cable systems as well, it should be obvious that there can be no margin for competitive entry. The programmer holds the reins at both ends.

At the present time for example, HBO has complete hold on all premiere titles from PARAMOUNT, 20TH CENTURY FOX, COLUMBIA, TRI-STAR, WARNER BROS., and MGM/UA TELECOMMUNICATIONS, INC., (see enclosed Multichannel News, May 15, 1989). Further, HBO has bought a considerable number of the "biggest" independent films as well, thereby owning and controlling the product, licensing the film to itself, and distributing (and restricting distribution) within all other markets. As a programmer, HBO continues to pay a huge financial premium to secure these exclusive program rights.

May 19, 1989

It is our contention that revenues of the HBO movie channel only justify these premiums paid due to the guaranteed subscriber base delivered by cable systems owned, in whole or in part, by HBO's corporate owner Time, Inc. In fact, it should be noted that all recent programming services such as The Travel Channel, The Discovery Channel, and the upcoming Comedy Channel have relied on cable system equity ownership for their success (see enclosed article, Multichannel News, May 15, 1989). It is unfortunate that within today's "marketplace" it is control over cable system carriage that determines the creation and existence of a new cable programming service.

It is also extremely important to note that cable monopolies have not been content to remain within the bounds of the cable market. This is of primary concern to StarDust Theatre. The exclusive movie contracts and the resulting movie programming clout in cable systems has been unfairly applied to include and dominate MDS, MMDS, SMATV and TVRO (aka DBS) markets as well; these are all StarDust Theatre markets. HBO dominates and has effectively eliminated competition in these unique markets as well as in their own cable arena.

Therefore, inasmuch as one corporate entity owns both the entertainment product and the forum for distribution as well, one has a closed marketplace. This harkens to the anti-trust situation of the mid-sixties when studios owned both the movie product and the movie theatre as well. The resulting consent decree forced divestiture of the movie studios interlocking equity interests. As this previous anti-trust case accurately reflects the situation as it exists today in Pay-TV, we strongly suggest the same remedy; cable system owners should be required to divest equity interest in both programming services and program suppliers.

The seriousness of this situation, borne out by the current wave of corporate lawsuits and congressional inquiry, requires a definitive Congressional action. Further, the monopolization of the cable marketplace and its encroachment upon otherwise competitive satellite channels requires a course of action that will recognize and eliminate all exclusive financial relationships. The issues are serious and the livelihoods of StarDust Theatre as well as all other new programmers hang in the balance.

I remain respectfully yours,

Jeffrey J. Younger
Executive Vice President

JY:jp

cc: Office of the Honorable Al Gore
Mark Ellison, SBCA

Multichannel News

Vol. 10 No. 20—May 15, 1989—$1.00

CITING ANTI-TRUST CONCERNS

SHOWTIME'S $2.4 BILLION SHOWDOWN

Seeks Damages From Time Inc., HBO, ATC

By JOHN M. HIGGINS

NEW YORK — The most immediate effects of Viacom Inc.'s $2.4 billion antitrust suit against Time Inc., Home Box Office and its cable affiliates, filed in U.S. District Court here last week, are expected to be not in court, but in Congress, where critics of the industry will find fresh ammunition for their calls to reregulate cable television, cable executives said.

Viacom's suit seeks at least $800 million in damages, which would be trebled under federal antitrust statutes to at least $2.4 billion.

While the suit cites Time's planned merger with Warner Communications Inc. as a further threat to Showtime, Viacom officials said they have no intention of attempting to block the merger, since work on the suit predates the merger announcement. However, industry observers said the increased price of Time's stock last week, following announcement of the suit, reflected a sense in the market that the merger could be derailed and that Time Inc. would be back in play as a takeover target.

EXCERPTS OF SUIT
SEE PAGE 30

The suit against Time, HBO and Time's cable operating units reflects the concerns and allegations made by some in Congress that cable operators are monopolies using their powers and intertwined associations to exclude competition.

The suit accuses Time of abusing its clout both as a major system operator and owner of Home Box Office Inc. to keep Viacom's Showtime and The Movie Channel underdog movie services. The suit represents a major climax in the intense competitive battle for subscribers fought between HBO and Showtime during the last eight years.

Until now, cable executives have spoken in a single voice against congressional attacks. But some officials expect critics on Capitol Hill to seize on Viacom's harsh charges to bolster their calls for reregulating the industry.

Glenn Manishin, a telecommunications partner in the Washington, DC, offices of Jenner & Block, said the Viacom suit marks the first break in cable MSOs' unified wall of opposition against application of antitrust controls on vertical and horizontal integration in the cable industry. "The

SEE SHOWTIME, PAGE 74

Paramount Sues Showtime

DISPUTE OVER FILMS PAYMENTS

By KIM MITCHELL

LOS ANGELES — Paramount Pictures Corp. has filed an $88.2 million-plus lawsuit against Showtime Networks Inc., parent company Viacom International Inc. and its major stockholder National Amusements Inc. for breach of contract and conspiracy regarding its exclusive pay TV contract.

The suit, filed in Los Angeles Superior Court, contends that Showtime has refused to make license fee payments on five recent films riding on the tail end of that five-year exclusive deal. The amount in dispute is about $38 million, but the studio is also seeking payment for other films which it says were made available to Showtime for pay TV exhibition, bringing the total amount to more than $88 million.

"In explaining its decision to reject the pictures Showtime has provided Paramount with a series of inconsistent and contradictory reasons for its action, many of which it later has admitted do not support its contentions," court papers filed by the studio claimed.

But Paramount attorneys allege the reason Showtime refused the five films is because National Amusements, its owner Sumner Redstone and Viacom are engaged in a "campaign" to skirt debts and liabilities to Paramount incurred by the company's former management. Redstone acquired Viacom in 1987 for $3.4 billion.

VIACOM POSTS STRONG FIRST QUARTER
SEE PAGE 65

Since the acquisition of Viacom, Redstone has engaged in a series of asset sales and in March exchanged all of the outstanding shares of exchangeable preferred stock for junior subordinated debt instruments in order to ease the company's debt load. Viacom also has considered taking on equity partners in Showtime Networks and has been involved in a series of on-again, off-again discussions with cable

SEE PARAMOUNT, PAGE 74

Showtime Sues Time Inc. for $2.4B

CONTINUED FROM PAGE 1

politicians will stand up and say, 'We're not all wet, even the MSOs are saying it about each other,' " he said. Manishin is a former Department of Justice antitrust lawyer who was responsible for telcommunications issues during the early 1980s.

An executive with one MSO agreed. The suit "plays right into the hands of the people who are trying to make those kind of absurd connections," said the executive, who asked not to be identified.

Victor LaBasso, president of Time-controlled Manhattan Cable Television Inc., concurred. He criticized Viacom for going to court to "hang out the dirty laundry" rather than settle the disputes privately. The suit will hurt "because of all the regulatory publicity," Labasso said.

Named in the suit are: Time; HBO; American Television & Communications Corp., Time's 82 percent-owned MSO; and Manhattan Cable, an ATC subsidiary with 245,000 subscriber.

Time and its affiliates are attempting "to tie up the narrow bottleneck (of) cable outlets and to tie up the scarce, most desirable film inputs for pay television programming services," the suit says. "No one else will be able to compete with them and the price of pay telvision programming services will rise."

According to the suit, Time has "engaged in an integrated series of predatory acts and strategies designed to impose prohibitive costs on competitors of defendant HBO Inc. in the market for pay television programming services in the United States, to raise barriers to entry and expansion in this market, to maintain defendant HBO Inc.'s monopoly power in the market and prevent the market from becoming competitive."

Time officials strongly denied Viacom's charges. "The timing and content of Viacom's suit are curious, inasmuch as Showtime has initiated and aggressively pursued practices it now condemns," Time said in a prepared statement. Most notably, Viacom pioneered exclusive agreements with movie studios for pay TV rights to packages of new movies.

Viacom accuses the Time Units of:

- Blocking Showtime from ATC's own systems. Showtime has never been offered to subscribers of MCTV or many of ATC's local systems. Although MCTV's LaBasso said Showtime will appear by the end of the year, Viacom is attempting to demonstrate a pattern of anti-competitive behavior here.
- Coercing MSOs to use buy-through schemes that prevent subscribers from signing up for Showtime or The Movie Channel unless they first buy both HBO and Cinemax. Since few subscribers want more than two pay movie channels, the suit says, such tiering schemes limit the Viacom services' subscriber base.
- Using time locks that deny MSOs promotional money unless they agree not to promote Showtime and The Movie Channel during key subscription campaign periods: January-February, May-June, and September-October.
- Locking up most desirable movies through exclusivity agreements with major studios. HBO has exclusive pay TV rights to new movies produced by most of Hollywood's major studios: Paramount Pictures Corp., Twentieth Century Fox Film Corp., Columbia Pictures Industries Inc., Tri-Star Pictures Inc., Warner Bros. Inc. and MGM/UA Telecommunications Inc.

Showtime has agreements only with Disney among the majors plus several smaller studios including Weintraub Entertainment Group Inc., Orion Pictures Inc., Cannon Films, Carolco Pictures and Imagine Films.

Viacom alleges that HBO is attempting to dry up the supply of movies available to Showtime and increase the prices of whatever product is available. HBO executives have boasted to system operators that "Showtime and The Movie Channel will not have a sufficient supply of recently released feature-length theatrical films to program their service," the suit said.

While the Viacom suit has been in preparation for more than a year, people close to the case said it is Time's planned merger with Warner that triggered last Tuesday's filing. The merger would give HBO control not only of all Warner movie product, but also Warner Cable Communications Inc.'s 1.5 million cable subscribers. Time, whose ATC already is the second-largest MSO (behind Tele-Communications Inc.), will then control 5.6 million subscribers — almost 13 percent of all U.S. basic units.

Securities analysts agree and expect Viacom to fight for a settlement constraining HBO. "I don't think they're really after $2.4 billion," said Mary Kukowski, cable industry analyst for Bear Stearns & Co. "I think what they want are improved business conditions."

But some MSOs said that instead of opening up Showtime's access to cable subscribers, Viacom could suffer from a backlash. One MSO executive, who spoke on the condition that he not be identified, said the suit could "unravel the industry" by disrupting relationships between operators and programmers. That distinction has become increasingly blurred as MSOs have jumped to buy stakes in programming services.

Not all cable executive agree. "I think it's great," said a programming executive of one major MSO, who spoke on the condition that he not be identified. "I don't think the cable industry can afford to lose Showtime as a service."

John Malone, president of Tele-Communications Inc., the nation's largest MSO, charged Viacom with hypocrisy for its complaints about HBO's exclusive deals with studios. "How can they complain about something they started?" Malone said. "They originated exclusive deals."

The suit is expected to drag on for years if it actually goes to trial. Viacom's charges are so broad that they will call for dozens of depositions and examination of thousands of documents. Drexel Burnham Lambert vice president Andrew Wallach said pretrial discovery alone could take well more than a year.

"Let's just say I'm not booking $2.4 billion into Viacom's retained earnings just yet," Wallach said. ■

Paramount Sues Showtime over Payment of Five Films

CONTINUED FROM PAGE 1

operators over such an arrangement. The sale of the company's Long Island and Cleveland cable systems resulted in proceeds of about $545 million.

Viacom reported a net loss of $188.8 million for 1988, an improvement over 1987 when it had a $219.3 million loss. According to figures released in January of this year by Paul Kagan and Associates, Showtime has 6.7 million subscribers and The Movie Channel 2.7 million. The pay TV unit posted a loss of about $13.3 million in 1988.

SNI this year posted a first-quarter loss from operations of $10.3 million, compared with a loss of $3.3 million during the same period last year. Showtime said that it incurred significant programming and marketing expenses during the quarter. The network said the higher costs reflected the exclusive agreements with motion-picture producers.

Showtime spokespersons said they could not comment on the lawsuit since they had not seen a copy of it by press time. However, a Showtime executive said the five Paramount films were refused because they did not fall within the parameters of the five-year exclusive contract. The officials also said that the amount Paramount is seeking is inflated, noting the fees due Paramount were actually half of the amount being asked for.

Paramount spokesperson Deborah Rosen said it is not the studio's policy to comment on legal matters.

The license fees due Paramount were in part also the result of a "shortfall" sum owed Paramount under terms of the exclusive deal that stipulated the license would be based on a per-subscriber fee and also a guarantee by Showtime that it would achieve a certain level of subscribers, according to Paramount.

Lower Sub Level

However, during the term of the agreement, Showtime was never able to reach that subscriber level, according to Paramount. The original five-year deal was valued in excess of $300 million.

"Showtime services never have had more than half of the total subscribers contemplated for the fifth contract year of the agreement and often have had fewer than 8 million total subscribers," according to the lawsuit. Then, because license fees did not reflect the projected subscriber base, the shortfall clause went into effect, Paramount said.

But the lawsuit alleges that Viacom, National Amusements and Redstone determined that the cost of the shortfall equaled the amount by which Showtime's guarantee liability would be reduced if five films were not delivered — or weren't accepted. According to the lawsuit, the five motion pictures rejected by Showtime did qualify for the exclusive arrangement. The movies are *She's Having A Baby, A New Life, Permanent Record, Plain Clothes* and *Blue Iguana*.

Showtime has been involved in a flurry of recent lawsuits, including one against Home Box Office Inc. filed last week in New York, and one in March in which Showtime was sued by Turner Entertainment Co.

Turner filed suit in U.S. District Court over use of films from the MGM/UA film library. TEC has been in dispute with both Showtime and HBO over whether it can put MGM/UA films that have been licensed to both pay services on Turner Network Television. TEC claims the HBO and Showtime licensing arrangements predate Ted Turner's purchase of MGM/UA. ■

HOME DISH ONLY
SATELLITE NETWORKS, INC.
419 PARK AVE. SO. NEW YORK, N.Y. 10016 (212) 696-1221

JEFFREY J. YOUNGER
Executive Vice President

March 17, 1989

Chris Harvie
Office of the Honorable Howard Metzenbaum
Senate Anti-Trust Committee
308 Hart Senate Office Bldg.
Washington, DC 20510

Dear Chris:

We appreciate the prompt attention of the Anti-Trust Committee. HBO's exclusive hold on new movie product has been in existence for quite some time, yet these movie deals have been a direct problem for StarDust Theatre since we began licensing pictures in February of 1988 for our subsequent launch on July 4, 1988 (We dubbed this day "Independence Day from Cable." - See back cover of the enclosed guide).

As I mentioned previously, StarDust Theatre is not a cable concern. The new movie service is designed entirely for the TVRO Direct Broadcast Satellite marketplace. Yet even so, we have been fighting an uphill battle with HBO in the cable arena in order to secure new movie product for our TVRO service.

As you can see by our guide, we have been making use of older product and highlighting the few premium pictures we are able to acquire. MCA/Universal, as the only non-exclusive studio, has been extremely accomodating. In fact, it is true that without access to their films such as "Dragnet", "Cry Freedom", "Milagro Beanfield War", "Willow" and others, we would most certainly be out of business. While our guide also carries a few "new-to-pay" movies from Orion the studio has since gone "exclusive" and new titles are no longer available. Further, 20th Century Fox, has recently signed an exclusive deal. While they have licensed StarDust several excellent movies such as "Princess Bride", "Wall Street", and "Broadcast News", their exclusive deal with HBO begins in February of 1990 and does not bode well for the continued existence of our channel. With the majority of the studios locked-up by HBO (see the attached list), the cable giant will in a very short time eliminate all competition in the TVRO market just as it has within cable.

Programming companies like ourselves cannot compete on an equal footing with HBO, therefore few exist. As a consequence, the market for Pay-TV product is extremely limited, affecting even independent movie makers. Independents must seek a "big money" deal with HBO; if they are turned away however, independent studios will not necessarily approach StarDust with the product. Due to HBO's dominance, as the sole Pay-TV buyer that has all but eliminated any other Pay-TV competitor, it may be to the independent studio's advantage to bypass the Pay-TV sale entirely. This eliminates the Pay-TV window completely so that the studio may effectively license the movie immediately to the next window of exhibition such as basic cable or network syndication. In this way, the film is not available to us, nor any other Pay-TV buyer and will consequently not appear on Pay-TV at all.

As an example, Cinecom, a large independent, has advised us that they may enter into an exclusive deal. If this does not occur, Arts & Entertainment a basic TV channel is said to be considering the possibility of then licensing the entire Cinecom library. This deal with a basic cable service would preclude any licensing agreements with any independent Pay-TV programmer including ourselves. Samuel Goldwyn's movie, "Mystic Pizza" further illustrates this point, as it was recently licensed directly to CBS network television. In this unprecedented move, the independent studio bypassed the Pay-TV market. While it is not known for a fact, this network deal suggests that HBO rejected the film deal, and that the Samuel Goldwyn studio, after determining that all other Pay-TV options are not viable, then proceeded directly to a succeeding window of exhibition.

It is in this way that independent product is "cherry picked" for exclusivity by HBO, and it is HBO therefore that effectively sets the Pay-TV window. Our experience with independents, Island Pictures, for example, has shown that films sit dormant ("warehousing" in effect) awaiting the HBO decision. Only if a non-exclusive deal is struck, will this product be made available to other program distributors, and as described previously the "independent studio" may even skip the Pay-TV option entirely.

March 17, 1989

While the above outlines some of the workings of Pay-TV licensing, it does not address the immediate concerns of Home Dish and StarDust Theatre (see my previous letter of March 15, 1988). We do not necessarily want to take issue with "Cable Exclusivity" at all. The major affront is the encroachment of HBO's Cable Exclusivity upon the different and separate market of TVRO (Direct Broadcasting Satellite). It is this unfair market practice that frustrates and angers us. StarDust Theatre does not compete at all with HBO in the cable arena; yet since HBO competes with StarDust in the TVRO market, they should be mandated do so on an even equal basis and not by re-appling existing cable clout within this new fledgling marketplace. The current situation denies StarDust major studio product and independent film product as well. While it is true that we suffer the dire consequences of these trade arrangements, it is more notable that the television consumer will be the ultimate victim.

Thank you for your time.

Sincerely,

JY:jp

cc: Paul Klein
Robert Kramer
Jeanne O'Grady
Maria DeVito

CANNON	- Multi-year deal (recently bought by Pathe)
COLUMBIA/TRI-STAR	- Exclusive on a picture by picture basis. Exclusive titles are "cherry picked" by HBO.
MGM/UA	- Exclusive through 1989 with HBO. (Year by year deal)
NEW WORLD	- (Same as Cannon).
PARAMOUNT	- Exclusive to HBO through 1994. (5 year deal)
20TH CENTURY FOX	- Exclusive to HBO. Deal begins February 1990 (5 year deal)
WARNER BROS. (LORIMAR)	- Exclusive to HBO through 1989 (Year by year deal)

HOME DISH ONLY
SATELLITE NETWORKS, INC.
419 PARK AVE. SO. NEW YORK, N.Y. 10016 (212) 696-1221

March 15, 1989

JEFFREY J. YOUNGER
Executive Vice President

Emily Young
Office of the Honorable Billy Tauzin
2342 Rayburn
Washington, DC 20515-1803

Dear Ms. Young:

Please extend my greetings to Congressman Tauzin. As an executive for the StarDust Theatre movie channel, I'm anxious to meet him at the upcoming SBCA breakfast on Tuesday, March 21st in Las Vegas.

Our company, Home Dish is not a cable concern as our satellite delivered channels are not carried on cable. We are one of the few truly DBS (Direct Broadcast Satellite) programmers and TVRO revenue is our lifeblood. As we depend on a working TVRO marketplace, we're pleased that Congress has taken an active interest in direct broadcast satellite issues.

Home Dish works directly with TVRO dealers, third party program distributors and home dish consumers, but has continued to compete with the largest cable programmer, HBO. As "scrappy" entrepreneurs, we thrive on competition, yet our present experience has shown that HBO's behavior is anti-competitive, having restrained the fair trade of new movie product to would-be competitors such as StarDust Theatre. As Congress continues to investigate the cable monopoly situation with an eye toward anti-trust action, I thought I would outline this basic problem.

Before VideoCipher scrambling (and therefore before the existence of any TVRO marketplace), HBO established "exclusive cable deals" with a number of movie studios. With the advent of scrambling, HBO somehow expanded its movie exclusivity to encompass this newly formed marketplace as well, thereby using its current clout in the cable arena to effectively bar any competing premium movie services in TVRO. Plain and simple, we are not allowed to license the newest most popular Hollywood studio films. Why should these pre-existing exclusive cable contracts automatically "cross" markets and be now applicable within the new TVRO marketplace? What justification allows this to happen?

OUT OF NEW YORK STATE CALL 1-800-824-2454

March 15, 1989

The joy of owning a satellite dish rests in Freedom of Choice. This multitude of viewing choices within the satellite sky is not realized by the limitations of the cable wire and the "vertical" control by HBO's parent company and their partners. Satellite is not constrained technically within a single cable and all choices are immediately available. When satellite programming decisions are made directly by the retail consumer without cable operator interference, there is strong potential for a highly competitive marketplace with a huge variety of programming services similar to what now exists in video stores. A programmer does not have to cow-tow within the cable industry in order to sell its product directly to the TVRO consumer. Unfortunately, HBO's existing cable "clout" denies us the current movie product and the TVRO market is thereby stifled by the manipulation of Time, Inc.

In addition to this "exclusivity market hopping" we question the legality of Time, Inc. and it's subsidiary HBO "locking up" the majority of all new studio movie product within the cable market; they use revenue from Time, Inc. owned cable systems and tie-in deals with other cable system owners to purchase these deals. This so called "vertical-integration" is highly questionable and may be an anti-trust issue for Congress to address. But whether legal or not, "Cable Exclusivity" should not be automatically translated as "TVRO Exclusivity". Again, our very survival requires that StarDust access Hollywood movies on an equal footing with HBO.

StarDust is ready, willing and able to pay identical studio movie fees to procure the premium "new to pay" films necessary for our channel's survival. Currently, we pay a premium on a per subscriber basis for the few new pictures made available and, we pay significantly more than HBO on a per subscriber basis for old movie product. None of our payments however, are capable of releasing these premium "cable" movies for our TVRO use.

As Congressional inquiries into the state of the "free" satellite marketplace are ongoing, I hope I've better acquainted you with our situation, - a programmer's problem. If satellite television is visualized as a sky full of video stores (with a wide array of entertainment on the shelves and an astronomical number of movie choices) our company is a video store without any copies of "Empire of the Sun", "BeetleJuice", "Moonstruck", "Platoon", "Dirty Dancing" or "The Last Emperor". So you see, when the rush is on, our doors are forcibly closed by the only game in town, HBO.

March 15, 1989

I appreciate your time and again look forward to meeting you.

Sincerely,

JY:jp

cc: Office of the Honorable Ed Markey
Office of the Honorable Mike Synar
Office of the Honorable Al Swift
Office of the Honorable Howard Metsenbaum
Office of the Honorable Larry Pressler

Paul Klein, Home Dish
Mark Ellison, Esq., SBCA

HOME DISH ONLY
SATELLITE NETWORKS, INC.
419 PARK AVE. SO. NEW YORK, N.Y. 10016 (212) 696-1221

M E M O R A N D U M

Paul Klein
w/NBC for 20 years

TO: CONGRESSMAN WJ TAUZIN

FROM: JEFFREY YOUNGER

DATE: MARCH 14, 1989

RE: STUDIO EXCLUSIVITY

Jeff Chester
3467 Troy Dr
LA CA 90068

Following studios have exclusive deals and the pay service is indicated:

Studios	Service
CANNON	HBO
COLUMBIA/TRI-STAR	HBO
HBO ENTERPRISES	HBO
LORIMAR	HBO
MGM/UA	HBO
NEW WORLD	HBO
PARAMOUNT	HBO
20TH CENTURY FOX	HBO
WARNER BROS.	HBO
DISNEY/TOUCHSTONE	SHOWTIME
ORION	SHOWTIME
MCA/UNIVERSAL	NON-EXCLUSIVE

A.D. Murphy
Variety

OUT OF NEW YORK STATE CALL 1-800-824-2454

April 14, 1989

The Honorable Howard M. Metzenbaum
Chairman, Subcommitee on Antitrust,
Monopolies and Business Rights
140 Senate Russell Office Building
Washington, D.C. 20510-3502

Dear Chairman:

I am writing on behalf of the private cable (SMATV) industry and the National Satellite Programming Network to express our strong support for the two bills you are introducing, the "Competition in Cable Television Act of 1989" and "Cable Television Subscriber Protection Act of 1989."

There is sufficient evidence that franchised cable companies and many programmers have used provisions of the Cable Act of 1984 to create unregulated monopolies. The very fact that private and wireless cable has survived with this intense anti-competitive pressure provides testimony that these industries serve special market needs. We believe that your bills will do much to level the playing field for companies competing in the distribution of multichannel television.

As our membership indicated to you in repsonse to your survey of our industry we believe that private cable operators, like the wireless cable interests represented at your April 12 hearing, are unfairly being prevented from serving consumers by being denied the chance to carry certain program services at competitive prices or terms.

NATIONAL SATELLITE PROGRAMMING NETWORK
1909 Avenue C Rosenberg, Texas 77471-1690 TEL 713-342-9655 FAX 713-342-7016

You are a leader on the side of consumer and competition. Without your efforts it would not have been possible over the past year to document the extent to which franchised cable and certain programmers are starting competition.

NSPN represents over 600 members, serving almost a million residential homes in multiunit communities located in all fifty states.

Your legislation is necessary and we pledge our willingness to help you secure passage. We look forward to working with you and would be happy to provide whatever documentation or other assistance that would be helpful to your efforts.

Sincerely,

R.L. Vogelsang
President

RLV:co

City of Millbrae
California

April 11, 1989

Senator Howard Metzenbaum
Chairman, Senate Judiciary Subcommittee on
Antitrust, Monopolies and Business Rights
308 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

The City of Millbrae is closely monitoring your Subcommittee's scheduled hearings on cable television regulation. We wish to add the following comments and recommendations to the hearing record.

(1) As you are aware, the Cable Communications Policy Act of 1984 (the Cable Act) granted the cable industry two major privileges, rate deregulation and a franchise renewal process that makes it virtually impossible for a local city or county not to renew an existing franchise. The combination of the two (along with other, less overriding concessions included in the Cable Act) has created the completely "unregulated monopoly" that cable is now regarded as by most knowledgeable observers.

(2) With respect to rates, it is necessary only to note the increase in cable system values that deregulation has produced. When Westinghouse sold its Group W cable systems at the end of 1985, the average price for its approximately 100 systems was about $1,100 per subscriber. Recent sales of other cable systems, less than three years later, have ranged from $2,500 to almost $3,000 per subscriber. System values, therefore, have increased 250% in a three year period. This increase is based upon the recognition that cable systems rates to subscribers will continue to rise, irrespective of capital and operating costs, with the only limit being the capability of subscribers to drop cable service. The cable industry has proclaimed that since cable is not a public utility (in their view) and not an essential service, subscribers can readily discontinue service if rates get too high. This belies the fact that cable, from the subscribers' viewpoint, is an essential service. (In many cases, subscribers with financial problems, are dropping telephone service before cable service, which speaks to the utility nature of cable.)

(3) In any event, with only one cable system serving the community, residents have the choice of subscribing to "the only game in town" or not subscribing at all. The natural

621 Magnolia Avenue • Millbrae, California 94030
(415) 692-6890

monopoly characteristics of cable make it virtually impossible economically for a second company to compete for a cable market after the first company is entrenched.

(4) The situation of no control on rates, combined with a single service provider, might possibly be tolerable if a city or county had the ability to replace a franchisee whose rates significantly exceeded industry norms, or whose service to subscribers was poor. The rate renewal constraints of the Cable Act, however, make this option impossible. Regardless of how poorly the cable operator performs, the cost to a community of a decision not to renew its franchise due to attendant litigation, is simply prohibitive. Therefore, a city cannot periodically choose among competing service providers, as it can for a taxicab or trash hauling franchise, but must consider the cable system, for all practical purposes, as a perpetual monopoly.

(5) The Cable Act contemplated some degree of local regulation, in communities where cable had "no effective local competition". The FCC, in its rush to deregulate whenever and wherever possible, defined effective competition in such a way as to preclude almost every community, and certainly all communities in urban and suburban areas, from being able to exercise any degree of regulation. It would certainly appear that the FCC has frustrated the intent of Congress in this regard.

(6) The cable industry argument with respect to effective competition is that even if only one cable system exists in a community, that system competes with over-the-air television, video cassette recorders, and other entertainment media for the attention of the community's residents. This is like saying that if only one supermarket is allowed in a city, the competition from tiny "mom-and-pop" stores will serve to regulate the supermarket's rates and services. This parallel, at least in the cable industry, turns out simply not to be true.

(7) Other aspects of cable service, while perhaps not as major as the above, also generate problems for local communities. As an example, the FCC issued technical standards in 1972 for cable systems, which in terms of today's cable technology, are hopelessly obsolete. (Even cable industry representatives admit that they can meet those standards and still provide poor-quality pictures to subscribers.) Yet, instead of tightening the standards to reflect advances in state of the art, the FCC incomprehensibly downgraded its own standards to "guidelines" (which presumably makes them unenforceable), and simultaneously preempted the entire area of technical standards to prevent local communities from establishing standards of their own. While it is true that a city may not be able to muster the technical resources of the FCC, the question of how good or bad the pictures are that

> are delivered by the cable system to subscribers would seem to be an absolutely essential component to being able to protect the consumer from monopoly abuse.

The result of these factors is that cities and counties are faced with a single service provider, that, in all likelihood, will remain entrenched and cannot be displaced. This provider has utility characteristics and privileges and yet has no effective regulation or competition. We and many neighboring cities consider this situation intolerable, and respectfully urge your Subcommittee and the Congress to take appropriate action to introduce a reasonable degree of local regulation, or competition, or both, into the cable industry.

Sincerely,

James R Erickson

James Erickson
City Administrator

cc: Senator Cranston
Senator Wilson
Representative Lantos

**City of
West Hollywood**

City Council
Helen Albert
Mayor
Abbe Land
Mayor Pro Tempore
John Heilman
Stephen Schulte
Paul Koretz

April 12, 1989

Senate Judiciary Committee on Antitrust
Monopolies and Business Rights
Subcommittee Clerk
308 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman:

We are City Councilmembers from West Hollywood, California. West Hollywood is a small urban city located between Beverly Hills and Los Angeles right below the Santa Monica Mountains. The City was incorporated in 1984 which happens to coincide with the enactment of the Federal Cable Act. We have experienced numerous problems with our cable franchisee, Century Communications Corporation, and would like to describe our experience for the Committee.

Subscriber rates have skyrocketed over 100 percent since deregulation went into effect. Over 30 percent of our population is senior citizens, many on fixed incomes, and this is especially burdensome for them. The dense urban architecture (structural interference) and geographic area in which the city is located inhibits the reception of off-air signals. The criteria by which "off-air reception" is determined is such that under current guidelines the cable operator can claim that "effective competition" does exist. Still, most residences in the city of West Hollywood, like many cities, is made up of large apartment and condominium buildings that tend to block out "off-air" reception from each other. In short, for many West Hollywood residents, if you do not have cable television you do not have television.

Given that there is only one cable television service provider in West Hollywood and no "off-air" competition, it is clearly evident that a monopolistic environment is allowed to exist.

Recently, the West Hollywood cable television system underwent a major conversion to an addressable and programmable system. The cable operator, Century

8611 Santa Monica Boulevard West Hollywood CA 90069-4109 213 854-7460

Communications Corporation, made claims that the system was state-of-the-art and capable of bringing the community countless new services. The claims were exaggerated and the deployment of the new terminals was done in a shamefully haphazard manner. While the cable company charged additional monies for the new "boxes," subscribers received less service and were unable to use the features of their expensive and sophisticated television sets and video machines. There were thousands of complaints that West Hollywood subscribers could not reach the company by phone to report serious service problems, in many cases a lack of service. However, the franchisee arrogantly and without notification to either the city or the residents, raised rates by more than 50 percent on two separate occasions within a six-month period.

It would seem the current cable television franchisee in West Hollywood has a policy of "revolving system management." Since taking possession of the Group W holdings in January of 1987, Century has had no less than five system managers in charge of the cable television system serving West Hollywood. We have just been advised that the current manager will be relocated and yet another individual will be brought in to "manage" our system. The lack of consistent management is clearly reflected in the substandard level of customer and technical service. Although the company earns over four million dollars a year in a very small cable television system, they continue to operate in a "barebones" fashion, raising the basic cable television rates without any concern for the public. These residents must pay the outrageous price of cable service since they cannot receive the local channels unless they subscribe.

In light of the magnitude of the recent failures on the part of the city's franchisee, the City was forced to initiate revocation procedures against Century Communications. The company's initial response to the City's actions was one of arrogance. The City was reminded that the Cable Act of 1984 denies the local franchise authorities the right to regulate rates and if the City were to vote to rescind the company's license on the grounds of poor technical service Century would bring suit. In fact, the company threatened litigation from the onset. It was only when they realized that our City Council would not be swayed by their intimidation, which at times manifested in the form of sending well known litigious attorneys to city cable television hearings, did they attempt to remedy the problems. Still, with blatant arrogance, they raised the rates.

What has become painfully clear from all of this is that the only leverage a franchise authority has to ensure that the consumers are not abused by this obvious monopoly, cable television, is the authority to regulate and authorize basic cable television rates. The cable television industry has proven that it is incapable of regulating itself. Rate gouging, substandard technical and customer services, sophomoric management practices and uncontrollable rate increases is what Century Communication Corporation has provided for West Hollywood. We urge the Committee to support regulation of the cable industry. De-regulation was tried. It has failed. It is time to give people back a basic right to receive information and programming via television without being held hostage by the cable industry.

Thank you for the opportunity to provide input.

Very truly yours,

John Heilman

Abbe Land
Mayor Pro Tempore

John Heilman
Councilmember

AL:JH:tb

town of vail

75 south frontage road
vail, colorado 81657
(303) 476-7000

VAIL 1989

office of the mayor

April 25, 1989

Honorable Howard Metzenbaum
United States Senate
Russell Senate Office Building, Suite 140
Washington, DC 20510

Re: Regulation of Cable Television Industry

Dear Senator Metzenbaum:

The Vail Town Council applauds you for bringing to light the gross inequities that have occurred since the cable television industry was deregulated by the 1984 Cable Act. Heritage Cablevision has increased basic cable rates in Vail by approximately 50% since deregulation took effect. The basic cable rate in Vail and Upper Eagle County of $21.95 is now at least 33% above the national average.

Vail's problem is exacerbated by the fact we can receive no broadcast television signals, so in order for any of our residents to receive any television service at all, it is necessary to subscribe to cable, and a true monopoly exists in our situation. We wholly support the National League of Cities' position as presented by Tucson Mayor Tom Volgy and Loredo Mayor Pro-Tem Saul N. Ramirez Jr. in their testimony before the Senate Judiciary Subcommittee on Anti-Trust, Monopolies and Business Rights. Our Town Attorney also gave extensive documention to the General Accounting Office when they were conducting their survey about a month ago.

Senator Howard Metzenbaum

We support your efforts to regulate an industry that has acted indiscriminately since deregulation. We suggest that any form of regulation that may be enacted by Congress not be restricted as to what percentage increase local governments can regulate on cable rates. In fact, it may be appropriate for local governments to have the authority to lower rates in certain instances, such as ours, where a true monopoly exists for any television reception, and where rates are so much higher than the national average.

If you need any further information, feel free to have your staff contact our Town Manager, Ron Phillips, or our Town Attorney, Larry Eskwith.

Sincerely,

Kent R. Rose

Kent R. Rose
Mayor

KRR/sas

cc: Senator William Armstrong (CO)
Senator Timothy Wirth (CO)
Representative Ben Nighthorse Campbell (CO)

City of Tuscaloosa

Post Office Box 2089
Tuscaloosa, Alabama 35403
[illegible]

Alvin P. DuPont
Mayor

COUNCILMEN

William Lanford
President Pro-Tem
District 6
Charles Steele, Jr.
District 1
John H. England, Jr.
District 2
Jerry Plott
District 3
Ed Montgomery
District 4
Sammy Watson
District 5
Thomas C. Dockery
District 7

April 14, 1989

Senator Howard Metzenbaum
Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum,

A year ago, we wrote to you on behalf of our citizens to voice our concern over the escalation of cable T.V. rates (see attached copy). Effective this June 1, 1989, we are facing yet another rate increase which will make a total of 61 percent in just the past two years.

I am attaching a resolution passed on April 13, 1989, by our City Council urging Congress to revisit the 1984 Cable Act. We have also sent this resolution, as well as many hundred letters, to our Alabama Delegation in hopes, that, they too will join your effort to have this Act revisited.

Our citizens are at the mercy of our local cable monopoly regarding rates, programming, and service. No other cable company will compete in this "controlled" market and this unfair trade practice is why only 32 of more than 8,000 cable systems have any direct competition.

Please continue the fight on behalf of our citizens to regulate this essential public service.

Sincerely,

Jerry

Jerry Plott, Councilman
City of Tuscaloosa

JP:dw

City of Tuscaloosa

Post Office Box 2089
Tuscaloosa, Alabama 35403
205/349-2010

Alvin P. DuPont
Mayor

COUNCILMEN

William Lanford
President Pro-Tem
District 6
Charles Steele, Jr.
District 1
John H. England, Jr.
District 2
Jerry Plott
District 3
Ed Montgomery
District 4
Sammy Watson
District 5
Thomas C. Dockery
District 7

COPY
LEGAL DEPARTMENT

May 19, 1988

Senator Howard Metzenbaum
Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

On behalf of the Tuscaloosa City Council and the citizens of the City of Tuscaloosa, I would like to voice our deep concern over the escalation of cable T.V. rates since the deregulation of cable rates in 1987.

Comcast, the cable company which serves our City, has increased its rates 41% in the last year. Comcast has a defacto monopoly in our City, as is most often the case, and this type of increase in one year is difficult to accept by our citizens, especially those living on fixed incomes. Rates will continue to increase in areas void of competition at the demand of higher profits or to meet the needs for new venture capital.

We are certain that cities and citizens are experiencing this problem nationwide. We urge you to please investigate this problem and ask that rates be regulated at either the national, state, or local level, especially in those areas void of competition.

Sincerely,

Jerry

Jerry Plott, Councilman
City of Tuscaloosa

JP:dw

APPROVED

RWE/dg

City Attorney

Legal Dept.

Prepared By RWE

Request By Plott

Presentation On 4-13-89

Suspension Of Rules Yes

RESOLUTION

RESOLUTION URGING CONGRESS TO AMEND CABLE COMMUNICATIONS POLICY ACT OF 1984 AND AUTHORIZING COUNCILMAN PLOTT TO SIGN A LETTER TO CONGRESSIONAL REPRESENTATIVES

WHEREAS, by virtue of the Cable Communications Policy Act of 1984, Congress, in essence, deregulated the cable industry and prohibited local governments from regulating cable rates; and,

WHEREAS, the result of this legislation has been to make an essential public service a de facto monopoly, with the citizens of these communities being the innocent victims of rapidly escalating rate increases; and,

WHEREAS, it is the position of the City of Tuscaloosa that cable TV service is of such a nature that it must be subject to more stringent governmental controls at both a national and a local level, especially in regard to the rates these de facto monopolies impose upon the citizens.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF TUSCALOOSA as follows:

That the City of Tuscaloosa goes on record as urging Congress to amend the Cable Communications Policy Act of 1984 to further regulate the cable TV industry, and particularly to allow local governments to, in some manner, control the rates charged by cable companies in order to protect the best interest of the public and to insure that cable TV as an essential public service not be allowed to victimize citizens without recourse or without consequence.

BE IT FURTHER RESOLVED BY THE CITY COUNCIL OF TUSCALOOSA that Councilman Jerry Plott be, and he is hereby, authorized, by and as an act for and on behalf of the City of Tuscaloosa to sign that certain letter now before the Council to the Congressional Representatives of the State of Alabama.

COUNCIL ACTION

Ord.

Intro.

2nd Reading

Unanimous

Failed

Tabled

Com.

Amended

Res. ✓

Passed 4/13/89

Failed

Tabled

Com.

Amended

Comments: S.R.

'89 04 11 12:21 ☎ 415 592 4714 BASE 02

CITY OF SAN CARLOS

666 Elm Street
San Carlos, California 94070

Administration
Telephone (415) 593-8011

April 11, 1989

Senator Howard Metzenbaum
Chairman, Senate Judiciary Subcommittee on
Antitrust, Monopolies and Business Rights
308 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

The City of San Carlos notes with strong interest your Subcommittee's scheduled hearings on cable television regulation. We wish to add the following comments and recommendations to the hearing record.

(1) As you are aware, the Cable Communications Policy Act of 1984 (the Cable Act) granted the cable industry two major privileges, rate deregulation and a franchise renewal process that makes it virtually impossible for a local city or county not to renew an existing franchise. The combination of the two (along with other, less overriding concessions included in the Cable Act) has created, indeed, the completely "unregulated monopoly" that cable is now regarded as by most knowledgeable observers.

(2) With respect to rates, it is necessary only to note the increase in cable system values that deregulation has produced. When Westinghouse sold its Group W cable systems at the end of 1985, the average price for its approximately 100 systems was about $1,100 per subscriber. Recent sales of other cable systems, less than three years later, have ranged from $2,500 to almost $3,000 per subscriber. System values,

therefore, have increased 250% in a three year period. This increase is based upon the recognition that cable systems rates to subscribers will continue to rise, irrespective of capital and operating costs, with the only limit being the capability of subscribers to drop cable service. The cable industry has proclaimed that since cable is not a public utility (in their view) and not an essential service, subscribers can readily discontinue service if rates get too high. This belies the fact that cable, from the subscribers' viewpoint, is an essential service. (In some cases, subscribers with financial problems, are dropping telephone service before cable service, which speaks to the utility nature of cable.)

(3) In any event, with only one cable system serving a community, residents have the choice only of subscribing to "the only game in town" or not subscribing at all. The natural monopoly characteristics of cable make it virtually impossible economically for a second company to compete for a cable market after the first company is entrenched.

(4) The situation of no control on rates, combined with only a single service provider, might possibly be tolerable if a city or county had the ability to replace a franchisee whose rates significantly exceeded industry norms, or whose service to subscribers was poor. The rate renewal constraints of the Cable Act, however, make this option impossible. Regardless of how poorly the cable operator performs, the cost to a community of a decision not to renew its franchise, with the attendant litigation, is simply prohibitive. Therefore, a city cannot periodically choose among competing service providers, as it can for a taxicab or trash hauling franchise, for example, but must consider the cable system, for all practical purposes, as a perpetual monopoly.

(5) The Cable Act contemplated some degree of local regulation, in communities where cable had "no effective local competition". The FCC, in its rush to deregulate whenever and wherever possible, defined effective competition in such a way as to preclude almost every community, and certainly all communities in urban and suburban areas, from being able to exercise any degree of regulation. It would certainly appear that the FCC has frustrated the intent of Congress in this regard.

(6) The cable industry argument with respect to effective competition is that even if only one cable system exists in a community, that system competes with over-the-air television, video-cassette recorders, and other entertainment media for the attention of the community's residents. While bearing a grain of truth, this is like saying that if only one giant supermarket is allowed in a city, the competition from tiny mom-and-pop stores will serve to regulate the supermarket's rates and services. This parallel, at least in the cable industry, turns out simply not to be true.

(7) Other aspects of cable service, while perhaps not as major as the above, also generate problems for local communities. As an example, the FCC issued technical standards in 1972 for cable systems, which in terms of today's cable technology, are hopelessly obsolete. (Even cable industry representatives admit that they can meet those standards and still provide poor-quality pictures to subscribers.) Yet, instead of tightening the standards to reflect advances in state of the art, the FCC incomprehensibly downgraded its own standards to "guidelines" (which presumably makes them unenforceable), and simultaneously

preempted the entire area of technical standards to prevent local communities from establishing standards of their own. While it is true that a city may not be able to muster the technical resources of the FCC, the question of how good or bad the pictures are that are delivered by the cable system to subscribers would seem to be an absolutely essential component of being able to protect the consumer from monopoly abuse. The result of these factors is that cities and counties are faced with a single service provider, that, in all likelihood, will remain entrenched and cannot be displaced, that has utility characteristics and utility privileges, and yet has no effective regulation or competition. We, and many neighboring cities to our knowledge, consider this situation intolerable, and respectfully urge your Subcommittee and the Congress to take appropriate action to introduce a reasonable degree of local regulation, or competition, or both, into the cable industry.

Sincerely,

Michael P. Garvey

Michael P. Garvey
City Manager

MPG/lg

cc: Senator Cranston
Senator Wilson
Representative Lantos

M. C. C. A.

Midwest Cable Consumer Alliance

M.C.C.A. MAIN OFFICE
4425 State Road
Medina, Ohio 44256
Telephone 216-239-1851

April 18, 1989

Dear Senator Metzenbaum.

I am enclosing a copy of the Grass Roots Organizations, that are working to pass the Cable Subscribers Bill Of Rights.

I am also enclosing a copy of all the Cities and Towns that have so far passed the Resolutions.

I hope this list will help you, to see what is trying to be attempted all across the country.

Thank you for your concern on the behalf of the consumer, it is very much appreciated, all of us will do our best to help you in this effort.

Respectfully,

Joan Conley

Joan Conley
Director, MCCA

enc.

M. C. C. A.

Midwest Cable Consumer Alliance

M.C.C.A. MAIN OFFICE
4485 State Road
Medina, Ohio 44256
Telephone 216-839-1251

NAMES OF CABLE GRASS ROOTS ORGANIZATIONS

C.A.U.C.U.S.
Consumers Against Unregulated Cable Utility Services
Preston Golder, Los Angles, California
Gary Bidwell, San Franscio, California

Alabama Dixie Cable Reform Council
Rick Zavicar, Jacksonville, Alabama

Huma County Alternative T.V.
Trudy Schuret, Huma Arizona

Flordia Alliance of Competitive T.V. Service
Iona Palameter, Crestview, Flordia

Neighbors Organized To Stop Cable Unregulated Monopolies
Mike McBride, Nimms, Flordia

Missourians Against Cable Monopoly Organized
Sue Beachler, Macon, Missouri

Citizens Aimed For Better T.V.
Gary Toeffer, Lousiana

People Against Cable Control
Ginger Fountain, New Mexico

New York State Cable Awareness Association
Tom Grasso, High Falls, N.Y.

Oklahomains For Fair Cable Service
Julia and Micheal Lovegrove, Oklahoma

Coalition To Save American T.V.
Joe Dodd, Denton, Texas

A.C.T.S.
Alternative Choice T.V.
Rosemary Peterson, Washington

M.C.C.A.
Midwest Cable Consumer Alliance
Joan Conley, Medina, Ohio

M. C. C. A.

Midwest Cable Consumer Alliance

M.C.C.A. MAIN OFFICE
4485 State Road
Medina, Ohio 44256
Telephone 216-239-1851

April 18, 1989

List of Cities That Have Passed Resolutions
NewPlatz,N.Y.
Albany,Ky.
Coperas Cove,Tx.
Ellenville,N.Y.
Atmore,Al.
Mountour Village N.Y.
Mountour Town,N.Y.
Mountour City,N.Y.
Atlanta,Missouri
Odessa,N.Y.
Follonsbee,W.Va.
Berewtown,Alabama
Little Falls,N.Y.
Concordia,Ks.
Frisco City,Alabama
Oswego,N.Y.
Sebastopol,Ca.
HuntsVille,Missouri
Schenectedy,N.Y.
Mobile,Alabama
Montrose,N.Y.
Lynchberg,Va.
LaPlata,Missouri
Plattekill,N.Y.
Nooksack,Wa.
Crestview,Flordia
Glendale,Ca.
Clarence,Missouri
Manitowac,Wi.
Everson,Wa.
Albany,N.Y.
Flomaton,Alabama
Wellsberg,W.Va.
Monroeville,Alabama
Macon,Ga.
Jacksonville,Alabama
DeFuniak Springs,Flordia
Werton,W.Va.
Sycaruse,Indiana
Cincinnati,Ohio
Wadsworth,Ohio

M. C. C. A.

Midwest Cable Consumer Alliance

M.C.C.A. MAIN OFFICE
4495 State Road
Medina, Ohio 44256
Telephone 216-239-1251

CABLE SUBSCRIBER BILL OF RIGHTS

This petition is a **CALL OF ACTION** to the 101st Congress to re-visit the Cable Deregulation Act of 1984 and amend it so as to bring effective competition in and out of cable areas.

We believe the cable systems are operating without effective competition and are therefore afforded monopoly status by the Deregulation Act of 1984.

We believe that alternative technologies should be given enhanced status to effectively compete in cable areas.

We believe that where a single cable system exists without 25% penetration by alternative technologies (dishes, wireless, pc, smatv telco, etc.) cities should be allowed oversight of the rates, channels, and service in a "public utility status".

We believe that where a cable system has public utility status the operator should not have a financial interest either direct or indirect in more than 5 of the channels selected for the system.

We believe that the subscribers 1st Amendment rights are of greater concern than the cable companies therefore all editorials are issues of controversy initiated over the cable by the cable owner or cable industry and are answerable on an equal access bases.

We believe that all local broadcast, and C-span 1 and 2 should receive first priority placement on cable channels.

We believe that multiple hook-ups to cable by a subscriber in their home should not cause an additional fee (like telephone jacks).

We believe that cable programming should be made available on a nondiscriminatory basis to alternative technologies through third party distributors for competitive delivery.

We believe that undisclosed gifts of cable programming and services to appointed or elected officials constitutes a bribe and should be illegal.

We believe that cable systems operating as "public utility" status must spend a designated percentage of profits to expand their area of services into unserved areas rather than to buy other systems or invest in ownership of channels.

We support the Association of States Attorney Generals investigation into antitrust activities by cable and believe this should be investigated by the U.S. Attorney General and the Federal Trade Commission.

We the people...

call on our Representatives in the 101st Congress to re-codify these rights by amending the Cable Deregulation Act of 1984.

Check between ( ) if you wish a newsletter

1. NAME (PRINTED) SIGNATURE ( ) CHECK

ADDRESS CITY STATE ZIP

2. NAME (PRINTED) SIGNATURE ( ) CHECK

ADDRESS CITY STATE ZIP

3. NAME (PRINTED) SIGNATURE ( ) CHECK

ADDRESS CITY STATE ZIP

4. NAME (PRINTED) SIGNATURE ( ) CHECK

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9. NAME (PRINTED) SIGNATURE ( ) CHECK

ADDRESS CITY STATE ZIP

10. NAME (PRINTED) SIGNATURE ( ) CHECK

ADDRESS CITY STATE ZIP

Signatures collected by: Name ______

Address ______ Signed ______

Date Submitted ______

NAMES ON THIS PETITION WILL NOT BE USED FOR ANY OTHER PURPOSE THAN THAT STATED

"YOU MAY REPRODUCE THIS FORM"

Additional letters and documents from cities supporting reregulation of the cable industry are on file and available for viewing in the Antitrust, Monopolies and Business Rights Subcommittee, 308 Hart Senate Office Building.

○